(22,447)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 188.

C. H. REXFORD, PETITIONER,

vs.

THE BRUNSWICK-BALKE-COLLENDER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 26, 1912.

a *Certified Transcript of Record.*

United States Circuit Court of Appeals, Fourth Circuit.

No. 946.

C. H. REXFORD, Appellant,
versus
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Record Filed December 10, 1909. Clerk's Office, U. S. Circuit Court of Appeals, Fourth Circuit. Henry T. Maloney, Clerk, Richmond.

1 TRANSCRIPT OF RECORD.

Style of Court.

THE UNITED STATES OF AMERICA,
Western District of North Carolina, To wit:

At a Circuit Court of the United States for the Western District of North Carolina, Begun and Held at the Court House, in the City of Asheville, on Tuesday, the first day of June, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable J. C. Pritchard, Circuit Judge.

Among other were the following proceedings, to-wit:

C. H. REXFORD, Appellant,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

C. H. REXFORD, Appellant,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

Attorneys for Plaintiff: Tucker & Lee, Adams & Adams, Julius C. Martin, Asheville, North Carolina.
Attorneys for Defendants: Merrimon & Merrimon, Asheville, North Carolina; Bryson & Black, Bryson City, North Carolina.

2 *Transcript from Superior Court Swain County, North Carolina.*

U. S. Circuit Court.

Filed Nov. 2, 1908. W. S. Hyams, Clerk.

Summons for Relief, Superior Court.

U. S. Circuit Court.

Filed Nov. 2, 1908. W. S. Hyams, Clerk.

Swain County, in Superior Court.

C. H. REXFORD
against
THE BRUNSWICK-BALKE-COLANDER COMPANY and W. C. HEYSER.

Summons for Relief.

The State of North Carolina to the Sheriff of Graham County, Greeting:

You are hereby commanded to summon The Brunswick-Balke Colander Company and W. C. Heyser, the defendants above named, if they be found within your county, to be and appear before the Judge of our Superior Court at a Court to be held for the County of Swain at the Court House in Bryson City on the 6 Monday before first Monday of Sept., 1908, it being the 27 day of July, 1908, and answer the complaint, which will be deposited in the office of the Clerk of the Superior Court of said County within the first three days of said term; and let the said defendants take notice that if they fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not and of this summons make due return.

Given under my hand and seal of said court, this 9 day of June, 1908.

[L. S.] O. P. WILLIAMS,
Clerk Superior Court.

3 We acknowledge ourselves bound unto The Brunswick-Balke Colander Company and W. C. Heyser, the defendants in this action in the sum of two hundred dollars; to be void, however, if the plaintiff, C. H. Rexford, shall pay to the defendants all such costs as the defendants may recover of the plaintiff in this action.

Witness our hands and seals this 9 day of June, 1908.

C. H. REXFORD, [SEAL.]
By W. A. REXFORD. [SEAL.]
J. E. COBURN. [SEAL.]

Endorsed on the back: C. H. Rexford against The Brunswick-Balke-Collander Company and W. C. Heyser. Summons for Relief. Returnable to July Term, 1908, of the Superior Court for Swain County. Received June 12, 1908. Served June 12, 1908, by reading the within to W. C. Heyser. Fee $.60c. G. W. Shuler, Sheriff Graham County.

Complaint.

Superior Court, July-August Term, 1908.

NORTH CAROLINA,
Swain County:

C. H. REXFORD
vs.
THE BRUNSWICK-BALKE-COLANDER COMPANY and W. C. HEYSER.

Complaint.

The above named plaintiff, C. H. Rexford, complaining of the above named defendants, alleges:

1st. That he is the owner in fee simple and is seized and possessed of a certain body of lands, situate in the counties of Swain and Graham, lying and being on both sides of Little Tennessee River, and fully and more particularly described in a paper writing hereto attached, marked "Exhibit A," which paper writing is made a part of this complaint, as fully as if herein copied, except certain tracts of land within said description in said Exhibit "A," which tracts of land so excepted are described in the deed made by J. S. Bailey to C. H. Rexford on the 26th day of September, 1906, which said deed was duly registered in Book "A. C.," at page 339 et seq., Records of Deeds of Swain County, North Carolina, which tracts are designated in said deed as exceptions 1st, 2nd, 3rd, 4th, and 5th, and for a more perfect description of said exceptions reference is hereby made to said Records.

4 2nd. That the defendants above named, prior to the commencement of this action, unlawfully and without a license therefor, entered upon the above described boundary of land, other than the exceptions above referred to, and cut, felled and carried away from said land, large quantities of the valuable timber standing, growing and being thereon, of the value of five hundred dollars, as the plaintiff is informed and believes.

3rd. That the plaintiff is informed and believes that the defendants claim to own some of the timber growing on the lands described in Exhibit "A," other than the excepted tracts as aforesaid, under and by virtue of pretended deeds, which purport to have been executed by James W. Terrell, pretending to be a commissioner to sell lands of William H. Thomas, which pretended deeds are registered in Book "D," at page 46, Records of Deeds of Swain County, North Carolina, and in Book "C," at pages 172 et seq., 180 et seq., and 183 Records of Deeds of Graham County, North Carolina, and

by a pretended deed purporting to have been executed by J. F. Loomis as Xenophon Wheeler to W. C. Heyser, registered in Book "AD," at page 500, Records of Deeds of Swain County, North Carolina, and registered in Book "Q," at page 457 et seq., Records of Deeds of Graham County, North Carolina. Also by a pretended Deed purporting to have been executed by W. C. Heyser to The Brunswick-Balke Colander Company, registered in Book "AF," at page 263 Records of Deeds of Swain County, North Carolina, and by a pretended Deed purporting to have been executed by W. C. Heyser to The Brunswick-Balke Colander Company, recorded in Book "R," at page 120, Records of Deeds of Graham County, North Carolina. That said pretended deeds constitute clouds upon the plaintiff's title.

Wherefore, the plaintiff demands judgment for the sum of five hundred dollars damages; that the above described pretended deeds be declared null and void; for the costs of this action and for such other and further relief as may be just in the premises.

ADAMS & ADAMS,
FRY & RABY,
Attorneys for the Plaintiff.

Beginning at a white oak on the state line, the sixty-four mile tree and runs with the line between North Carolina and Tennessee, N. 83½ E. 14 poles; thence N. 62 E. 20 poles, N. 51° E. 13 poles; thence N. 11° E. 20 poles; thence N. 57° E. 32 poles; thence N. 75 E. 51 poles; thence 25° W. 24 poles; thence N. 44° E. 24 poles passing a fallen pine at 16 poles; thence N. 22½° W. 14 poles; thence N. 22½° E. 14 poles; thence N. 63° E. 9 poles; thence N. 40° E. 24 poles; thence N. 23° E. 8 poles; thence N. 79° E. 14 poles; thence N. 44½° E. 32 poles; thence N. 23° E. 26 poles; thence N. 56½° E. 8 poles; thence N. 15° E. 14 poles; thence N. 74° E. 7 poles to a hickory marked as a corner; thence N. 62° E. 36 poles; thence N. 80° E. 14 poles; thence N. 61° E. 18 poles; thence S. 78° E. 12 poles; thence N. 62° E. 20 poles; thence N. 73½° E. 34 poles; thence S. 79° E. 28 poles; thence N. 55½° E. 26 poles; thence N. 62° E. 12 poles; thence S. 80° E. 16 poles; thence N. 48° E. 20 poles; thence N. 67½° E. 10 poles; thence N. 89° E. 40 poles; thence 58½° E. 16 poles to an old white oak corner in the gap of the mountain; thence S. 74° E. 32 poles; thence N. 56° E. 26 poles; thence S. 77½° E. 30 poles; thence N. 46° E. 12 poles; thence N. 65½° E. 16 poles; thence N. 26½° E. 14 poles; thence N. 62½° E. 8 poles; thence N. 67° E. 30 poles crossing Welche's old turnpike road at 25 poles; thence N. 10 E. 32 poles; thence N. 37° E. 32 poles; thence N. 46° E. 40 poles; thence N. 9½° E. 16 poles to a Spanish oak on the State line, marked as a corner; thence with the line of tract No. 6704 East crossing the pole bridge branch at 142 poles, 320 poles to a stake in a small hollow, a small chestnut, small black oak, and small hickory, marked as corners; thence S. 78 poles to a stake, and pointers the Northwest corner of tract No. 6700; thence East with that line crossing a small branch at 72 poles Judas' Branch at 95 poles 320 poles to a Spanish

oak near the top of a ridge; thence N. 6 poles to a chestnut oak on a steep hill side, the Northwest corner of tract No. 6701; thence with that line S. 67° E. crossing a small branch at 18 poles the West fork of Twenty mile Creek at 115 poles, the East fork, at 210 poles, 320 poles to a chestnut oak, near the top of the ridge; thence South crossing a small branch at 50 poles 426 poles to a Maple on the bank of Tennessee River the Southwest corner of tract No. 6708; thence with that line [illegible]0° E. 640 poles to a chestnut near the bank of Twenty Mile [illegible]eek; thence S. 60 E. 380 poles to a stake and pointers near the top of the ridge; thence S. 20 W. 60 poles to a stake and double chestnut on a steep hill side, the Northwest corner of tract No. 6703; thence with that line East 314 poles to the West line of tract No. 6702; thence with that line North 30 poles to the Northwest corner of tract No. 6702; thence with that line East 260 poles; thence South 20 West 58 poles to a stake; thence South 140 poles to a fallen white oak on the Northwest bank of the Tennessee River; thence down said River with its meanders to a cucumber, the Northeast corner of tract No. 29; thence with that line S. 86° W. 95 poles to a stake; the Northwest corner of said number; thence South 88 poles to a Horn-Beam on the bank of the Tennessee River, a corner of tract No. 29; thence down the river with its meanders to a chestnut oak on the bank of the river, 6 the Southwest corner of tract No. 6702; thence with the line of tract No. 6702, North 185 poles to the line of tract No. 28; thence with that line West 35 poles to the line of tract No. 6703; thence with that line S. 20 W. 183 poles to a stake on the bank of the river the Southeast corner of tract No. 6703; thence down the river with its meanders to a sweet gum the Southeast corner of tract No. 25; thence with that line North 45° E. 195 poles to a chestnut, a corner of tract No. 25 and 26; thence with the line of tract No. 26 N. 34 poles to a beech on the bank of the branch; thence West 154 poles to a pine on a ridge; thence S. 30° W. 140 poles to a beech on the Bank of the Tennessee River the S. W. corner of tract No. 25; thence down the river with its meanders to a small maple on the bank of the river, the S. W. corner of tract No. 6708 and the S. E. corner of tract No. 6701; thence crossing the river to a spruce pine on the S. bank of the Tennessee river the N. E. corner of tract No. 1075; thence with that line S. 20° E. 63 poles to a stake; thence S. 75° W. 5 poles to a white oak; thence S. 10° W. 8 poles to the line of tract No. 595; thence with that line S. 55° E. 64 poles to the S. E. corner of said Number 595; thence with that line S. 70° W. 65 poles to the line of tract No. 1075; thence with that line S. 3° E. 12 poles to a chestnut in a field; thence S. 58° W. 205 poles to a black oak; thence S. 15° W. 60 poles to a chestnut oak; thence S. 35° W. 28 poles to a chestnut; thence S. 82° W. 71 poles to a chestnut oak; thence N. 55° W. 51 poles to a locust; thence north 50 poles to a small hickory; thence N. 80° E. 20 poles to a hickory; thence N. 10° E. 22 poles to a stake in the line of tract No. 595; thence with that line S. 70° W. 30 poles to the S. W. corner of said tract No. 595; thence with that line N. 50° W. 110 poles to the S. E. corner of tract No. 1318; thence with that

line S. 80° W. 180 poles to the S. W. corner of said number; thence with that line N. 40° W. 127 poles to a black oak the N. corner of said number; thence with said line N. 80° E. 110 poles to the line of tract No. 292; thence with that line N. 72° W. 195 poles to the line of tract No. 1728; thence with that line S. 85° W. 155 poles to a pine, corner of said number on the line of said tract No. 1727; thence with the line of said Number 1727 S. 20° E. crossing the Robbinsville road at 139 poles 223 poles to a chestnut oak on a rock; thence with that line S. 45 W. 106 poles to a black gum on the South bank of the Cheoah River; thence up the river with its meanders to a chestnut oak on the South bank of said River; thence S. 35° E. 40 poles to a spruce pine; thence S. 15° W. 104 poles to a maple; thence S. 70° W. 440 poles to a white oak in a Cove; thence N. 60° W. 640 poles to a chestnut oak crossing East fork of Bear Creek at 520 poles and the West Fork at 536 poles; thence S. 85° W. 40 poles to a forked black oak; thence S. 55° W. 194 poles to a chestnut on top of the ridge; thence N. 20° W. 234 poles to five chestnuts; thence N. 15° E. 116 poles to a white oak on top of the divide between Bear Creek and Slick Rock Creek; thence N. 45° E. 46 poles to a pine; thence N. 74 poles to a chestnut; thence N. 10 E. 74 poles to a black oak; thence N. 53° E. 208 poles to a chestnut; thence N. 25° W. 70 poles to the corner of tract No. 611; thence with that line N. 65° E. 120 poles to a stake on the S. bank of the Tennessee River; thence down said River, with its meanders to a stake on the N. Bank of said River in the North Carolina and Tennessee Lines; thence with that line E. 60 poles to the Beginning.

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Petition for Removal to U. S. Circuit Court.

STATE OF NORTH CAROLINA,
Swain County:

In the Superior Court, October Term, 1908.

C. H. REXFORD, Plaintiff,
VS.
THE BRUNSWICK-BALKE COLENDER COMPANY and W. C. HEYSER, Defendants.

To the Honorable Superior Court of Swain County, State of North Carolina:

The petition of the Brunswick-Balke Collander Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware and W. C. Heyser, defendants, in the above entitled action respectfully show to this Honorable Court:

1st. That your petitioners are defendants in the above entitled action.

2. That said action has been commenced against them in said court by said plaintiff, and that said action is of a civil nature.

3. That the plaintiff in this complaint herein claims that he is the owner in fee of the lands described in his complaint in said action and that the defendants are claiming title to some of the timber, on said land, and that the deeds under which the defendants claim, constitute a cloud on plaintiff's title, and that defendants have trespassed upon said lands and cut timber to the value of five hundred dollars.

4. That your petitioners dispute said claim, and deny the alleged trespass and claim that the defendant corporation is the owner of said timber in fee simple.

8 5. That the matter in dispute in this action exceeds the sum of two thousand dollars exclusive of interest and costs.

6. That the controversy in this action and every issue of fact and law therein, is wholly between citizens of different states and which can be fully determined as between them that is to say, the plaintiff, H. C. Rexford, is now, and was at the time of the commencement of said action and of the filing of the complaint therein and still is a citizen and resident of the State of Pennsylvania, and the defendant, the Brunswick-Balke Colender Company was then, and still is, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and a citizen of said last named State, and the defendant, W. C. Heyser, was then, and still is, a citizen and resident of the State of Tennessee.

7. That the land in controversy, and the trees thereon, the subject of this action, are situated in said County of Swain, and partly in Graham County, North Carolina, in the State of North Carolina, and in the Western District of North Carolina.

8. That the time for your petitioners, as defendants, in this action to answer or plead to the complaint in said action has not yet expired and your petitioners have not yet filed or in any way appeared therein so as to deprive them, or either of them of their right to have said action removed to the Circuit Court of the United States for the Western District of North Carolina.

9. Your petitioners herewith present a good and sufficient bond as provided by the statute in such cases, that they will, on or before the first day of the next ensuing session of the United States Circuit Court for the Western District of North Carolina, file therein a transcript of the record of this action, and for the payment of all costs which may be awarded by said court, if the said court shall hold that the suit was wrongfully or improperly removed thereto.

Your petitioners therefore pray that this court proceed no further herein, except to make the order of removal as required by law and to accept the bond presented herewith and direct a transcript of the record herein to be made for said court as provided by law, and as in duty bound your petitioners will ever pray.

THE BRUNSWICK-BALKE COLENDER COMPANY,
W. C. HEYSER.

BRYSON & BLACK AND
J. H. MERRIMON,
Solicitors for Petitioners.

9 COUNTY OF SWAIN,
State of North Carolina, ss:

W. C. Heyser, being duly sworn according to law, deposes and says:

I am one of the petitioners in the above written petition and am the General Manager of the other of said petitioners and have read the said petition, and the same is true of my own knowledge except such matters as are therein stated on information and belief, and as to such statements, I believe it to be true. I make this affidavit of verification both on my own behalf and on behalf of my co-petitioner.

W. C. HEYSER.

Subscribed and sworn to, etc., Oct. 28, 1908.

O. P. WILLIAMS,
Clerk Supreior Court.

Bond for Removal.

THE STATE OF NORTH CAROLINA,
Swain County:

In the Superior Court at October Term, 1908.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE COLENDER COMPANY and W. C. HEYSER, Defendants.

Bond for Removal.

Know all men by these presents, that we, The Brunswick-Balke Colender Company, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and W. C. Heyser of the State of Tennessee, as principals, and J. B. Carringer and J. E. Coburn, as sureties, residents and citizens of the County of Swain, State of North Carolina, are held and firmly bound unto C. H. Rexford, plaintiff in the above entitled cause, in the sum of five hundred ($500) dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we and each of us bind ourselves, and each of us, our heirs, executors and administrators, firmly and securely by these presents.

Sealed with our seals and dated this 28th day of October, A. D. 1908.

The conditions of this obligation are such that: Whereas the said The Brunswick-Balke Colender Company and W. C.
10 Heyser have applied by petition to the Superior Court of the State of North Carolina, in and for the County of Swain, for the removal of a certain cause therein pending wherein C. H. Rexford is plaintiff and the said The Brunswick-Balke Colender Company and W. C. Heyser are defendants, to the Circuit Court of the

United States for the Western District of North Carolina, for the further proceedings on grounds in the said petition set forth, and that all further proceedings in said action in said State Superior Court be stayed.

Now therefore, if your petitioners, the said The Brunswick-Balke Colender Company and W. C. Heyser shall enter in said Circuit Court of the United States for the Western District of North Carolina, aforesaid, on or before the first day of the next regular session, a copy of the records in said suit, and shall pay, or cause to be paid, all costs that may be awarded therein by the said Circuit Court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

THE BRUNSWICK-BALKE COLENDER COMPANY, [SEAL.]
By W. C. HEYSER, *Agt.* [SEAL.]
J. B. CARRINGER. [SEAL.]
J. E. COBURN. [SEAL.]

Sureties' Justification.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE COLENDER COMPANY and H. W. HEYSER, Defendants.

COUNTY OF SWAIN,
State of North Carolina, ss:

J. B. Carringer and J. E. Coburn, the sureties named in the foregoing bond, being first duly sworn each for himself deposes and says as follows: I am the same person whose name is subscribed to the foregoing bond, and I state I am a householder and free holder and resident of the County and State aforesaid, and that I am worth the sum of five hundred ($500) dollars named therein as the penalty thereof, over and above all my just debts and liabilities, exclusive of property which is exempt from execution.

J. B. CARRINGER.
J. E. COBURN.

11 Subscribed and sworn to etc. this 28th day of October, A. D., 1908.

[SEAL OF SUPERIOR COURT.] O. P. WILLIAMS,
Clerk Superior Court.

Clerk's fee 50c. pd.

On back thereof, endorsed: "H. C. Rexford, Plaintiff, v. The Brunswick-Balke Colender Company, and H. W. Heyser, Defendants. Petition and Bond for Removal to the United States Circuit Court for the Western District of North Carolina, and order of removal. Filed Oct. 28, 1908. O. P. Williams, C. S. C.

Plaintiff's Answer to Petition to Remove.

STATE OF NORTH CAROLINA,
Swain County:

In the Superior Court.

C. H. REXFORD, Plaintiff,
VS.
THE BRUNSWICK-BALKE COLENDER COMPANY and W. C. HEYSER, Defendants.

Plaintiff's Answer to Petition to Remove.

The above named plaintiff, C. H. Rexford, answering the petition of the defendants filed in the above entitled action to remove said action from the State to the Federal Court, for his answer, says:

1st. That the allegations contained in paragraph eight of said petition are not true, as the plaintiff is informed and believes.

2nd. That a summons was duly issued in the above entitled action by the Clerk of the Superior Court of Swain County, N. C., on the 9th day of June, 1908, and was duly served on the 12th day of June, 1908, which summons was made returnable to the September-October Term of Swain Superior Court, 1908, which term has expired all of which plaintiff is informed and believes.

3rd. That plaintiff is informed and believes that his Honor R. B. Peebles, Judge, holding *holding* the Courts of the 16th Judicial District of North Carolina on the 9th day of June, 1908, upon
12 affidavit of the plaintiff granted a restraining order against the defendants, their servants and employees, restraining and enjoining the said defendants, their servants and employees from cutting and removing timber from the lands referred to in the defendant's petition, which restraining order was made returnable before his Honor, Judge Fred. Moore, at Asheville, N. C., on the 27th day of June, 1908, and was afterwards continued by consent and heard before his Honor, R. B. Peebles, Judge, at Waynesville, N. C., on the — day of July, 1908, when and where the defendants above named appeared through their counsel, Bryson and Black, as well as some of them appearing in person and opposed the continuing of said restraining order to the hearing, but said restraining order was continued to the hearing of the action.

4th. That the plaintiff is informed and believes that at the return term of said summons, to-wit: at the September-October Term of Swain Superior Court, 1908, A. M. Fry, attorney for the plaintiff, appeared in said court for the plaintiff and asked for thirty days in which to file a complaint, and Bryson and Black, attorneys, for the defendants, appeared in said court for the defendants and asked thirty days thereafter to file an answer, and sixty days was granted to the plaintiff and thirty days after notice was granted to the defendants.

That before the time for filing a complaint, expired, as the plaintiff is informed and believes the said A. M. Fry, requested the said Bryson and Black to grant him, that is the plaintiff, further time to file his complaint which request was granted and the complaint was filed on the 30th day of September, 1908, and the same has been on file ever since the same was filed.

5th. That the plaintiff is informed and believes that the defendants, have waived their right to have said case removed to the Federal Court, if they ever had any, by their acts above set forth, and more especially by failing to make their application during the return term of said court, to-wit: the September-October term, 1908.

Wherefore, the plaintiff prays that the defendants' petition be denied.

W. A. REXFORD.

W. A. Rexford, being duly sworn, deposes and says that the plaintiff, C. H. Rexford, is not present to make this verification, but is at his home in Gallatin, in the State of Pennsylvania, but that this affiant is the agent of the said plaintiff, C. H. Rexford, and that
13 the facts stated in the foregoing answer are practically all of record and are within the knowledge of this affiant; that he has read the foregoing answer and the same of his own knowledge is true except such matters as are stated on information and belief, and as to those matters & things he believes it to be true.

W. A. REXFORD.

Sworn to and subscribed before me on the 29 day of October, 1908.

[NOTARIAL SEAL.]

R. H. CLARK,
Notary Public.

Term expires Nov. 24, 1910.

NORTH CAROLINA,
Swain County:

A. M. Fry, being duly sworn, says that he is an attorney for the plaintiff in the within named action, that the plaintiff is now out of the State of North Carolina as affiant is informed and believes and is not here to amend this answer, this affidavit, that affidavit and the amendments made to said petition are of record and affiant has examined the said records and find that they show that the summons was issued on the 9th day of June, 1908, was served on the 12th day of June, 1908.

That the September Term of this court has expired, that affiant has read said amendment to said answer and the said answer as amended is true of his own knowledge, except as to matters stated on information and belief and as to them, he believes it to be true.

A. M. FRY.

Sworn to and subscribed before me this Oct. 29, '08.

O. P. WILLIAMS, *C. S. C.*

On the back of which appears endorsed the following: "C. H. Rexford vs. The B. B. & C. Co."
Answer of plaintiff to defendant's petition to remove.

Entries from Minute Docket.

There appears from Minute Docket No. 8, as on file in the office of the Clerk of the Superior Court of Swain County, State of North Carolina, the following entries: Page 151, July Term, 1908.

14 "C. H. REXFORD
vs.
THE BRUNSWICK-BALKE-COLANDER COMPANY and W. C. HEYSER.

20 S. D.

Plaintiff allowed *allowed* 60 days in which to file complaint."

Also on page 182 of same book, the following, at same term—

20, S. D.

"C. H. REXFORD
vs.
THE BRUNSWICK-BALKE-COLANDER COMPANY and W. C. HEYSER.

Defendant allowed 30 days after notice answer. Complaint filed Sept. 30, 1908.

Clerk's Certificate, Swain County Superior Court.

NORTH CAROLINA,
Swain County:

C. H. REXFORD
vs.
THE BRUNSWICK-BALKE COLENDER COMPANY and W. C. HEYSER.

I, O. P. Williams, Clerk of the Superior Court of the County of Swain, State of North Carolina, do hereby certify that the foregoing and attached 52 sheets are a true and perfect copy and transcript of the record and papers on file and entries appearing on the Minute Docket in my office, as Clerk of the Superior Court, as aforesaid, in the above entitled action of C. H. Rexford versus The Brunswick-Balke Collendar Company and W. C. Heyser.

Witness my hand and official seal this the 31st day of October, A. D., 1908.

[SEAL.]

O. P. WILLIAMS,
Clerk Superior Court.

15 Endorsed: No. 592. C. H. Rexford vs. The Brunswick-Balke Collender Co. and W. C. Heyser. Transcript Superior Court Swain Co. U. S. Circuit Court. Filed Nov. 2, 1908. W. S. Hyams, Clerk.

Findings of Fact by Superior Court, Swain County.

U. S. Circuit Court. Filed Nov. 2, 1908. W. S. Hyams, Clerk.

Swain County Superior Court, October Term, 1908.

C. H. Rexford, Plaintiff,
vs.
The Brunswick-Balke Colender Company and W. C. Heyser, Defendants.

On motion to remove the above entitled action to the United States Circuit Court for the Western District of North Carolina the court finds the following facts from inspection of the record and upon affidavit, to-wit:

1. The Summons was issued June 12th, 1908, returnable to the July Term, 27th of July, 1908.

2. Said summons was served on W. C. Heyser, June 12th 1908, and was not served on the Def't Company.

3. At the said July Term, Messrs. Bryson & Black, attorneys at law, entered a general appearance for both Def'ts.

4. At said term, plaintiff in open court, moved for time to file complaint and was given sixty days to file complaint, and defendants on motion of counsel were allowed thirty days to file answer after notice that complaint had been filed.

5. The complaint was filed September 30th, 1908, and no notice given to defendants.

6. This motion was made, and petition and bond filed October 28th, 1908.

7. The bond is solvent and good for $500.00.

8. The plaintiff is a resident and citizen of the State of Pennsylvania. W. C. Heyser is a citizen and resident of Tenn. and the other defendant is a corporation chartered under the laws of Delaware.

16 9. The action is to remove cloud of title of a tract of land and damages for trespass, situated in Swain and Graham counties, N. Carolina.

Upon the foregoing facts found I decline to order the removal.

R. B. PEEBLES,
Judge Presiding.

To the above decision the def'ts except.

R. B. PEEBLES, *Judge.*

In the Superior Court.

NORTH CAROLINA,
Swain County:

I, O. P. Williams, Clerk of the Superior Court in and for the County of Swain and State of North Carolina, do hereby certify that the foregoing and attached one sheet is a true and correct copy of the findings of fact and order made by his Honor, Judge R. B. Peebles, in the case of C. H. Rexford vs. The Brunswick-Balke Colender Company and W. C. Heyser, as appears on file in my office.

Witness my hand and official seal this 2nd day of November, 1908.

[SEAL.] O. P. WILLIAMS,
Clerk Superior Court.

Motion to Remand.

U. S. Circuit Court. Filed Nov. 7, 1908. W. S. Hyams, Clerk.

UNITED STATES OF AMERICA,
District of North Carolina:

In the Circuit Court.

In Equity.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE-COLANDER COMPANY and W. C. HEYSER, Defendants.

Motion to Remand.

Now comes the plaintiff, C. H. Rexford, and by leave of court, through his attorneys, A. M. Frye and Adams & Adams, enters a special appearance;

17 And appearing, specially moves the court that the above entitled cause be remanded to the Superior Court for the County of Swain, in the State of North Carolina for that this court has no jurisdiction to try said cause.

And further for that the motion of said defendants to remove this cause, comes too late, and said defendants having failed to move in apt time for such removal, and said motion not having been made within the time allowed by law, for the making thereof.

A. M. FRYE.
ADAMS & ADAMS.
Attorneys for Plaintiff.

Indorsed: C. H. Rexford vs. Brunswick-Balke Collander Company et al. Motion to Remand.

Order Denying Motion to Remand.

U. S. Circuit Court. Filed Nov. 9, 1908. W. S. Hyams, Clerk.

In the Circuit Court of the United States, Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Plaintiff,
against
THE BRUNSWICK-BALKE COLLANDER COMPANY and W. C. HEYSER, Defendants.

This cause, coming on at this November Term, 1908, on the motion of the plaintiff to remand this cause to the State court, counsel for the plaintiff stated to the court that the only question to be submitted for the court's decision and ruling upon the motion, was whether the defendants filed their petition and bond for removal in the State court, in apt time, as required by the statutes in such cases made and provided, and thereupon contended that such petition and bond were not filed in apt time, and that the cause, should for this reason, be remanded. The court after hearing counsel denied the motion to remand.

Therefore it is ordered that said motion to remand be, and the same hereby, is denied. And it is further ordered that
18 the defendants have leave to file answer to the complaint within thirty days.

Nov. 9th, 1908.

JAS. E. BOYD,
U. S. Judge.

JNO. S. ADAMS.

Plaintiff excepts to the foregoing ruling of the court and to this order. Exception allowed.

JAS. E. BOYD,
U. S. Judge.

Endorsed: C. H. Rexford v. the Brunswick-Balke Collander Co. and W. C. Heyser. Order Denying Motion of Plaintiff to Remand.

Answer.

U. S. Circuit Court. Filed Nov. 18, 1908. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY and W. C. HEYSER, Defendants.

Answer of The Brunswick-Balke-Collender Co.

The answer of the Brunswick-Balke-Collender Company, a corporation existing and duly organized under and by virtue of the laws of the State of Delaware, to the bill of complaint of C. H. Rexford, a citizen and resident of the State of Pennsylvania, plaintiff:

This defendant, now and at all times hereafter, saving to itself all manner of benefits of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in said bill contained for answer thereto, or to so much thereof as this defendant is advised it is material, or necessary for him to make answer to, answering says:

19 I.

That this defendant had no knowledge or information sufficient to form the belief as to the truth of the allegations contained in the first paragraph of the complaint, and therefore denies the same, and leaves the plaintiff to make such proof thereof as he shall be able to produce.

II.

That the allegations of the second paragraph of the bill of complaint are denied.

III.

That the allegations of the third paragraph of the bill of complaint are denied in so far as they charge that this defendant claims under pretended deeds, and this defendant avers that the deeds mentioned in said third paragraph are valid and based upon a valid valuable consideration, and are valid and effectual to convey to the bargainees or grantees named therein, their heirs, successors or assigns, complete, perfect and absolute title, to two thousand two hundred and seventy-two (2,272) pine trees, and one thousand two hundred and forty-eight (1,248) poplar trees, two feet and over in diameter at the butt, situated on nine (9) tracts of land of the Wm. H. Thomas land, on the north bank of the Tennessee river, in the county of Swain and State of North Carolina; said tracts beginning on the Tennessee State line and joining each other, and each and

every tract being bounded on the south by said river and extending up said river as far as State survey number thirty (30), the said nine (9) tracts being granted to Wm. H. Thomas in grants Numbers 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506 and 1507, all aforesaid trees being marked with the letter "L" and being the same timber trees conveyed by James W. Terrell to J. F. Loomis and Exophin Wheeler, by deed dated August 3, 1883, which deed is registered in Book D, page 46, of the Records of Deeds of Swain County and State of North Carolina; also one thousand and seventy-two (1,072) poplar trees, and one hundred and forty-one (141) pine trees, two feet and over in diameter at the butt, situated on the land of said Thomas, on Tennessee river and the Farley Branch in District No. 10, Graham county, North Carolina, and covered by state grants of entries numbers 595 and 1398; also sixteen hundred and forty-five (1,645) poplar, and twelve hundred and ninety-five (1,295) pine trees, two feet and over in diameter at the butt, on the waters of Tennessee and Cheoh Rivers, in the tenth land district of Graham County, North Carolina, covered by interest numbers 1726, 1727 and 1728, made in Cherokee county before the creation of Graham county, and entries numbers 299 and 398, of Graham county aforesaid; all of said trees being situated in the now County of Graham, and being marked and branded with the letter "L."

The defendant further answering says that it is the owner in fee simple of all said timber trees above described, standing and being on the land above described in the counties of Swain and Graham aforesaid, and denies that any of the deeds mentioned in said paragraph three of the bill of complaint, or all of them together, cast a cloud upon plaintiff's title to said timber trees or the land on which they stand, if the plaintiff has any title to same, which this defendant denies.

And this defendant further answering said third paragraph of the bill of complaint says, that by virtue of the provisions of said deed referred to and mentioned in said paragraph, it has authority, right and title to enter upon the land described in said deed and upon which said trees are situated, for the purpose of cutting and removing said trees, together with the authority, right and title, to make such roads over and through said land, suitable and proper to enable it to remove said trees whenever it may so desire.

And this defendant farther answering said third paragraph of said bill of complaint says, that it is entitled, as it is advised and believes, to the full benefit of all the provisions, stipulations and covenants in favor of the grantees and their successors, heirs and assigns, contained in any or all of said deeds.

And this defendant farther answering said third paragraph of the bill of complaint says: that it is entitled, as it is advised, to the immediate, sole, and exclusive, unrestricted and undisturbed possession of said trees, hereinbefore mentioned and described, to enable it to sever and remove the same from the said land and to have and dispose of the same at its pleasure; that owing to the natural difficulties and obstacles in the way of severing and remov-

ing said trees, in the past, neither this defendant nor any one from or through who it claims, had been able to sever and remove the same until now there is an immediate prospect of the construction of a railroad through or near said land, thus making it practicable to cut, sever and remove and transport said trees to market without loss to this defendant.

Wherefore, this defendant having fully answered, confessed, traversed, and avoided or denied all the matters in said bill of complaint material to be answered according to its best knowledge and belief, humbly prays this honorable court to enter its judgment that this defendant be hence dismissed with its reasonable costs and charges in its behalf most wrongfully sustained, and for such
21 other and farther relief in the premises as this honorable court may deem meet and in accordance with equity.

W. C. HEYSER.

Attorneys for Defendant:

MERRIMON & MERRIMON.
BRYSON & BLACK.

W. C. Heyser, being duly sworn, says:

I am the agent and general manager of the defendant, The Brunswick-Balke-Collender Company, in the State of North Carolina, and as such make this verification; that I have heard read the foregoing answer and know the contents thereof; that the same is true of my own knowledge, except as to such matters as are stated on information, advice and belief, and as to such matter, I believe it to be true.

W. C. HEYSER.

Subscribed and sworn to this 18th day of November, 1908.

[SEAL.] W. S. HYAMS,
Clerk U. S. Circuit Court.

Endorsed: No. 592. C. H. Rexford v. The Brunswick-Balke-Collander Co. et al. Answer of the Brunswick-Balke-Collander Co.

Answer and Disclaimer of W. C. Heyser.

U. S. Circuit Court. Filed Nov. 18, 1908. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Plaintiff,
against
THE BRUNSWICK-BALKE-COLLENDER COMPANY and W. C. HEYSER, Defendants.

Answer of W. C. Heyser,

The answer and disclaimer of W. C. Heyser, one of the above named defendants, to the bill of complaint of the above named plaintiff.

In answer to said bill says as follows:

22 I have not and do not and never had, or claimed to have, any right or interest in any of the matters in question in this suit, and I disclaim all right, title and interest, legal and equitable, in any of said matters; and I say that if I had been applied to by the plaintiff before the filing of his bill, I should have disclaimed all such right, title and interest; and I submit that the bill against me ought to be dismissed with costs.

W. C. HEYSER.

MERRIMON & MERRIMON,
BRYSON & BLACK,
Attorneys for Defendant W. C. Heyser.

Indorsed: C. H. Rexford vs. The Brunswick-Balke-Collander Co. et al. Answer of W. C. Heyser.

Motion to Dismiss the Bill.

U. S. Circuit Court. Filed Mar. 15, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit. In Equity.

C. H. REXFORD
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY and W. C. HEYSER.

Motion to Dismiss the Bill.

Comes now the defendants in the above cause and move the court to dismiss the bill of complaint therein for want of equity, right or title, the plaintiff therein having failed to file replication, therein

to answer heretofore filed on the 18 day of November, 1908, by the defendants as required by Equity Rule 66.

This 15th day of March, 1909.

BRYSON & BLACK,
JAMES H. MERRIMON,
Solicitors for Def'ts.

Endorsed: C. R. Rexford v. The Brunswick-Balke-Vollender Co. and W. C. Heyser. Motion to Dismiss Bill, March 15, '09. Bryson & Black, James H. Merrimon, Solicitors.

23 *Order Allowing Time to File Replication and that Plaintiff Have Leave to Amend His Bill of Complaint.*

U. S. Circuit Court. Filed Mar. 20, 1909. W. S. Hyams, Clerk.

United States of America, Western District of North Carolina, Fourth Circuit. In Equity.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE-COLLANDER COMPANY and Others.

Order.

Now on this the 18th day of March, A. D., 1909, this comes on to be heard upon application of the plaintiff for time to file replication and the defendant appearing, by its counsel, J. H. Merrimon, withdraws the motion heretofore filed in this cause on the 15th day of March, 1909, to dismiss the same for failure to file replication; and consents that the plaintiff may have until the next rule day to file such replication and to amend his bill of complaint, in case he may be so advised.

Now it is ordered that the plaintiff have until the next rule day to file his replication in this cause. And it is further

Ordered that the plaintiff have leave to amend his bill of complaint as he may be advised.

Dated this 20th day of March, A. D., 1909.

J. C. PRITCHARD,
U. S. Circuit Judge.

By consent:
J. H. TUCKER,
A. M. FRYE, &
ADAMS & ADAMS,
Att'ys for Plaintiff.

By consent:
JAMES H. MERRIMON,
Att'y for Defendant.

Endorsed: C. H. Rexford vs. W. C. Heyser et al. Order.

24 *Replication.*

U. S. Circuit Court. Filed Apr. 1, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States in and for the Western District of North Carolina.

In Equity. No. —.

C. H. REXFORD
vs.
BALKE-COLLANDER COMPANY et al.

Replication.

This replicant saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors uncertainties, and insufficiencies of the answer of the defendant, W. C. Heyser, for replication thereunto saith:

That he doth and will aver, maintain, and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient, in law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things, this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays, as in and by his bill he hath already prayed.

FRYE & RABY,
J. H. TUCKER,
ADAMS & ADAMS,
Solicitors for Complainant.

Endorsed: C. H. Rexford vs. Brunswick-Balke Colander Co. et al. Replication.

25 *Motion for Leave to File Amended Bill.*

U. S. Circuit Court. Filed Apr. 1, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States in and for the Western District of North Carolina.

In Equity. No. —.

C. H. REXFORD
vs.
BALKE-COLANDER COMPANY et al.

Motion.

Comes now the plaintiff above named and moves the court that he have leave to file the amendment to his said bill hereto attached.

A. M. FRYE,
J. H. TUCKER,
ADAMS & ADAMS,
Solicitors for Complainant.

Order Granting Complainant Leave to File Amended Complaint.

U. S. Circuit Court. Filed Apr. 1, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States in and for the Western District of North Carolina.

In Equity. No. —.

C. H. REXFORD
vs.
BALKE-COLLANDER COMPANY et al.

Order.

It is hereby ordered by the court that leave be and the same is hereby granted to the said complainant, C. H. Rexford, to file an amendment to his bill of complaint in the above entitled action attached to motion for such leave.

J. C. PRITCHARD,
U. S. Circuit Judge.

1st day of April, A. D., 1909.

26 Endorsed: C. H. Rexford vs. W. C. Heyser et al. Motion Order.

Amended Complaint.

U. S. Circuit Court. Filed Apr. 1, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY, and W. C. HEYSER, Defendants.

Amended Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Western District of North Carolina:

C. H. Rexford, by leave of court in that behalf first had and obtained, brings this his amendment to his bill of complaint against said defendants.

And thereupon your orator complains and makes amendment of his said bill herein as follows:

First, by erasing and striking out paragraph three thereof and in substitution and lieu of said paragraph insert the following:

Your orator further shows upon information and belief, that among other pretenses the said defendants allege and claim a large number of trees now standing and growing on the lands described in Exhibit "A," other than the excepted tracts as aforesaid under and by virtue of a pretended deed, which purports to have been executed by one James W. Terrell, pretending to act as a commissioner to sell the lands of William H. Thomas, lunatic, to Xenephon Wheeler and J. F. Loomis, which said pretended deeds are registered in Book D., at page 46 in records of deeds for Swain county, North Carolina, and in Book C., at pages 172 and 180 and 183, records of deeds of Graham county, North Carolina, and by a pretended deed purporting to have been executed by J. F. Loomis and Xenephon Wheeler to W. C. Heyser, registered in Book A. D. at page
27 500, of records of deeds of Swain county, North Carolina, and Book Q. of deeds at page 457, records of deeds of Graham county, North Carolina, and by two pretended deeds, purporting to have been executed by W. C. Heyser to The Brunswick-Balke-Collender Company, registered in Book of Deeds A. F., at page 263, of records of deeds of Swain County, and in Book R., at page 120 of records of deeds of Graham county; and that by reason of the wild and inaccessible nature of the country, the said trees could not, and it was not intended that they should, be removed at the time of the said pretended purchase thereof, by the said Wheeler and Loomis, all of which said pretenses your orator avers are false and untrue.

And your orator further shows that the said James W. Terrell had no authority whatsoever as commissioner or otherwise to sell or

convey said trees to the said Loomis and Wheeler or any other person.

And your orator further shows that at the time, or soon after the pretended purchase of said trees by the said Wheeler and Loomis under whom said defendant now pretends to claim, and many years prior to the purchase of said land and trees by your orator, said Loomis and Wheeler, pretending at that time to be the owners of said trees, entered upon said land and cut and removed all of the trees referred to in the said pretended deeds which were of any value, and if any of said trees were left they were scattered over about ten thousand acres of the land described in your orator's bill of complaint which said remaining trees, if any, were at that time of little or no value, and which by reason of their being scattered over so large a territory, it would have been unprofitable at that time, and still would be unprofitable, to remove the same, and which on that account, as your orator is advised, informed and believes, were abandoned by the said Loomis and Wheeler.

And your orator further shows that about twenty-seven (27) years has elapsed since the said pretended and alleged purchase of said trees by said Loomis and Wheeler, and that said Loomis and Wheeler and those claiming under them long prior to the pretended purchase by this defendant of their pretended title and claim to said trees, abandoned and renounced any and all alleged or pretended right or title, they pretended to claim in said trees, and that this plaintiff and those under whom he claims have been in the continuous and uninterrupted control of said land and trees, paying taxes thereon for more than twenty (20) years, and as your orator is advised and believes, during all of that period the said defendant and those under whom they claim have made no claim whatever to said trees or any of them until by reason of the great advance in price within the last three (3) years in lumber and products of like nature, said defendants thinking it possible that said trees
28 might now be of some value and knowing that the land had greatly increased in value within the last three years, and that your orator was about to sell the same for a large amount, brought forward their alleged pretended and fictitious claim to said trees and entered upon said land and attempted to remove the same.

And your orator further shows that the pretended deeds and conveyances under which said defendants now pretend to claim, allowed said defendants, or those under whom they claim, a reasonable time to remove such of said trees as they desired and that those under whom the said defendants claim did within such reasonable time enter on said land and remove said trees.

And your orator further shows that such reasonable time for the removal of said trees, if said defendants and those under whom they claim ever had any title or right to remove the same, which your orator expressly denies, has long since expired. And your orator further shows that said pretended deeds claims and pretenses of said defendants now constitute a cloud on their title to said land.

Wherefore, your orator prays as he has heretofore prayed in his original bill of complaint, and further your orator prays that said

defendant may be perpetually enjoined from entering upon said land, and from cutting or in any way interfering with the trees now standing and growing thereon; and that said defendants may answer, but not under oath, such oath being hereby waived according to the pretense of this court, all and singular the matter stated and charged in said original bill of complaint and those hereinbefore stated and charged, in this your orator's amended bill of complaint.

A. M. FRY,
A. D. RABY,
ADAMS & ADAMS,
J. H. TUCKER,
Attorneys for Plaintiff.

29 *Notice of Motion to Appoint an Examiner.*

U. S. Circuit Court. Filed Apr. 12, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States in and for the Western District of North Carolina. In Equity.

C. H. REXFORD
vs.
W. C. HEYSER and THE BRUNSWICK-BALKE COLLANDER CO.

To J. H. Merrimon and Bryson & Black, Solicitors for the Defendants:

You will please take notice that the plaintiff, C. H. Rexford, in the above cause desires the evidence in this case to be taken orally under Equity Rule 67, and will in pursuance thereof apply to the Hon. J. C. Pritchard, Judge, on the 14th day of April, A. D., 1909, to appoint —— ——, the Standing Master of this court as examiner under the provisions of Equity Rule 67 in Equity to take the testimony of witnesses for plaintiff to be used in the trial of the above cause in behalf of plaintiff.

FRYE & RABY,
J. H. TUCKER,
ADAMS & ADAMS,
Solicitors for Plaintiff.

Endorsed: C. H. Rexford vs. W. C. Heyser et al. Notice of Motion. Service accepted April 12, '09. James H. Merrimon of counsel for defts.

30 *Motion to Appoint Special Examiner.*

U. S. Circuit Court. Filed Apr. 12, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States in and for the Western District of North Carolina. In Equity.

C. H. REXFORD
vs.
W. C. HEYSER and THE BRUNSWICK-BALKE COLLENDER CO.

To the Judges of the Circuit Court of the United States for the Western District of North Carolina:

And comes C. H. Rexford, the plaintiff, and says that the above cause is now at issue, and that he desires that the evidence to be adduced in the cause shall be taken orally.

Wherefore he moves the court to appoint —— ——, the Special Examiner to take the testimony in this cause under provisions of Equity Rule 67.

FRYE & RABY,
J. H. TUCKER,
ADAMS & ADAMS,
Solicitors for Plaintiff.

Endorsed: C. H. Rexford vs. W. C. Heyser et al. Motion.

31 *Order in re Law and Documentary Evidence.*

U. S. Circuit Court. Filed Apr. 15, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States in and for the Western District of North Carolina. In Equity.

C. H. REXFORD
vs.
W. C. HEYSER and THE BRUNSWICK-BALKE COLLENDER CO.

The above entitled cause, coming on to be heard on application of the complainant for the appointment of a Special Examiner to take the testimony therein under Equity Rule 67;

And it appearing to the court that the rights of the defendants in this action depends primarily on several questions of law based on documentary evidence of its title to the trees in question;

And it further appearing to the court that it would facilitate the hearing of said cause, if such documentary evidence were offered and such preliminary question of title first disposed of by the court.

Now therefore it is ordered that these questions of law and the documentary evidence bearing thereon be first presented to the court for argument and all questions of fact in this cause be held in abeyance until said preliminary questions are disposed of by the court.

And it is further ordered that this cause be and the same is set for hearing before the court on said questions on the 28th day of April, A. D., 1909, time 3 P. M. o'clock at Asheville, North Carolina.

This order is made without prejudice to the rights of either party in case the court is of the opinion that it is necessary that further evidence be taken in said cause.

April 15th, 1909.

J. C. PRITCHARD,
U. S. Circuit Judge.

Dated 15th day of April, A. D., 1909.

Indorsed: C. H. Rexford vs. W. C. Heyser et al. Order in re hearing.

32 *Answer to Amended Complaint.*

U. S. Circuit Court. Filed Apr. 27, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States, Western District of North Carolina, Fourth Circuit.

In Equity.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY and W. C. HEYSER, Defendants.

Answer of The Brunswik-Balke-Collander Company to the Amended Complaint of the Plaintiff Herein.

The Separate Answer of the Defendant The Brunswick-Balk-Collender Company to the Amended Bill of Complaint.

This defendant reserving all manner of exceptions that may be had to the uncertainties and imperfections of the Amended Bill, comes and answers thereto, or to so much thereof as it is advised is material to be answered and says:

1. That it adopts its answer to the said third paragraph of the original complaint herein, in so far as the same is an answer, or applicable, to the allegations of the substituted paragraph third set forth in the Amended Complaint, as its answer to said third paragraph so substituted, and hereby makes said answer to said original third paragraph of said original complaint a part of this answer.

And further answering said Amended Bill of Complaint, or amendment of said original complaint says: that it denies that said James W. Terrell had no authority as commissioner or otherwise to sell or convey said trees to Loomis and Wheeler, but, avers that on the contrary, said Terrell, as commissioner, had authority to sell and convey said trees, and acting in pursuance of his said authority did sell and convey the same to said Loomis and Wheeler in fee simple,

without exception or reservation or condition, or any qualification whatever, as by reference to said conveyance will fully, and without ambiguity appear.

33 Further answering this defendant denies that said Loomis and Wheeler, at the time, or soon after said conveyance, cut and removed all of the trees referred to in said conveyance. It is true that said Loomis and Wheeler did enter upon said land and cut and remove some of said trees both pine and poplar, but the number of said trees so cut and removed was only a small proportion of said trees; and it denies that the said trees not cut and removed were of no value, but scattered over about 10,000 acres of land, and says on the contrary, that said trees not cut and removed were and are of very great value. It is admitted that said trees could not be cut and removed at a profit, when they were conveyed to Loomis and Wheeler, and that at no time since said trees were so conveyed, until recently, could they have been cut and removed at a profit. It is denied that the deeds of conveyance from said Terrell to said Loomis and Wheeler limited the grantees in said deeds to a reasonable time to remove said trees, or to any time whatsoever; but, on the contrary, said deeds of conveyance conveyed to said Loomis and Wheeler the title to said trees in fee simple absolute and conferred upon said Loomis and Wheeler, their "heirs and assigns right to enter upon the lands upon which said trees are situated and upon any other lands belonging to said Thomas for the purpose of cutting and removing said trees and * * * the right of ingress and egress over the same lands and the right to make such roads over any of said lands, suitable and proper to make them to remove said trees whenever they may so desire."

Further answering, this defendant denies that said Loomis and Wheeler, or any one, under and through whom, this defendant claims, abandoned or renounced any right or title or claim to said trees, and it is denied that those from and under whom this defendant claims, or this defendant, has made no claim to said trees, at any time, and denies that it now, or at any time, or that any one from or under whom it claims now or at any time, made or makes claim to said trees upon the ground because of the advance in price within the last three years, or within any other year or time, and avers that its claim is made upon and in virtue of its title, and that it is now, and prior to, and at the commencement of this action or suit was, and is the owner in fee simple absolute of all the said trees not cut and removed from said lands, and that its title invests it with all the rights, privileges, license, easements and franchises conferred upon said Loomis and Wheeler by the conveyances made to them by said Terrell and confirmed by the Superior Court of the said County of Jackson, in the State of North Carolina.

Further answering, this defendant denies, that even if it, or those under whom it claims are confined to a reasonable time within which to cut and remove said trees from said lands, said

34 reasonable time has not expired, and avers that at no time after the conveyance by said Terrell, Commissioner to said Loomis and Wheeler of said trees, prior to the commencement of this action or suit, did the plaintiff, or any one from whom he claims

notify this defendant or any one from whom it claims, to cut or remove said trees, or make any claim that said conveyances limited any one from or under who- this defendant claims, or this defendant to a reasonable time within which to cut or remove said trees.

Further answering this defendant denies that the said deeds of conveyance from said Terrell, Commissioner, to said Loomis and Wheeler for said trees, constitute a cloud on plaintiff's title to said land and denies that any deed of conveyance in the chain of title under which this defendant claims said trees constitute- such cloud, and denies that the plaintiff has or ever had title or right to, or interest, legal or equitable in said trees.

Having thus made full answer to all matters and things contained in the amended bill or amendment of the original complaint, this defendant prays to be dismissed hence with its costs in this behalf incurred.

BRYSON & BLACK AND
JAMES H. MERRIMON,
Solicitors for Defendant.

April 27, 1909.

W. C. Heyser, being duly sworn, says:

I am the agent and General Manager of the defendant, the Brunswick-Balke Collander Co. in the State of North Carolina, and as such agent and manager make this verification: I have heard read the foregoing answer to the Amended Bill, or amendment of the original complaint herein, and know the contents thereof; that the same is true according to my best information and belief and the advice upon the matters and questions of law involved.

W. C. HEYSER.

Subscribed and sworn to this 27th day of April, 1909.

[SEAL.]

W. S. HYAMS, *Clerk*,
By M. L. RORISON, *Deputy*.
By M. L. RORISON, *Deputy*.

Endorsed: C. H. Rexford vs. The Brunswick-Balke Collender Company et al. Answer to Amended Bill April 27, '09. Bryson & Black and James H. Merrimon, Sols. for Defendants.

35 *Hearing Before Judge Pritchard.*

U. S. Circuit Court. Filed Nov. 29, 1909. W. S. Hyams, Clerk.

C. H. Rexford, Plaintiff,
vs.
W. C. Heyser & The Brunswick-Balke Colander Corporation, Defendants.

Statements by Attorneys Taken for Benefit of Judge Pritchard.

Hearing Before Judge J. C. Pritchard, United States Circuit Court, Asheville, N. C., April 28th, 1909.

Judge Merrimon: It is admitted on both sides that W. H. Thomas was the owner in fee simple and in possession of the lands named and described in the petition of W. H. Hilliard, Guardian, and of the lands mentioned in the deeds from J. W. Terrill, Commissioner, to Loomis & Wheeler, and of the lands mentioned in the deeds from the heirs of W. H. Thomas to Bailey, and in the deed from Bailey to Rexford.

Mr. Adams: The petition under which they claim, recites the fact that Thomas was the owner of many tracts of land in the counties of Clay, Cherokee, Graham, Jackson, Macon and Haywood, as I remember it, and refers to an exhibit for more particular description of said land, said Exhibit said to be attached to the petition or record. As it now stands, the record shows no such exhibit. We admit that these lands lay in the Counties of Swain and Graham, and belonged to Thomas at the time of that proceeding, but we do not care to admit that the description in his original proceeding is sufficient to cover. This is the question of law we wish to present. We desire to offer our chain of title.

Mr. Pickens: We have agreed on this point: that these deeds cover the identical land. (All agreed.)

Mr. Fry (for Defendants): If it please your Honor, may I ask Judge Merrimon if we may present as evidence these papers (indicating papers belonging to Judge Merrimon)?

Judge Merrimon: They are at your service.

36 Mr. Fry: We now want to introduce transcript of the Record of Jackson County in special proceedings in the case of James R. Thomas, Guardian of William H. Thomas, Love Thomas, De Witt Thomas, Marsh Thomas and Bryan Thomas, infants under twenty-one years of age and children of Wm. H. Thomas, deceased. This petition was filed on the 15th day of April 1903, in the Supreme Court of Jackson County (marked Exhibit "A").

Exhibit A.

Transcript Special Proceedings in Jackson County in Case James R. Thomas, Guardian.

U. S. Circuit Court. Filed Nov. 29, 1909. W. S. Hymns, Clerk.

State of North Carolina,
Jackson County:

Superior Court.

Before the Clerk.

James R. Thomas, Guardian of Wm. H. Thomas, Love Thomas, De Witt Thomas, Mariah Thomas, and Bryan Thomas, Infants under Twenty-one Years of Age and Children of Wm. H. Thomas, Deceased.

This petition was filed on the 15th day of April, 1909, in the Superior Court of Jackson County (marked Exhibit "A").

Petition for Sale of Land.

To the Superior Court of Jackson County and State of North Carolina:

The petition of James R. Thomas, Guardian of Wm. H. Thomas, Love Thomas, Mariah Thomas, Dewitt Thomas, and Bryan Thomas, minors and infants under twenty-one years of age and children of W. H. Thomas, Jr., dec'd, showeth:

That the above named infants and Sallie Patton who is now married to William Patton, reside in the County of Jackson and the State of N. C. and are the only children and heirs at law of William H. Thomas, Jr., dec'd, and as such heirs at law are the owners in fee simple of one undivided third of the lands hereinafter described, and your petitioners, James R. Thomas, in his own right, and Sallie L. Avery, wife of A. C. Avery, are the owners of one-third each of said lands.

37 That many years ago one James W. Terrell as commissioner under a pretended authority from the Probate Court of the County of Jackson, pretended to sell an undivided half interest in two thousand acres of land to T. H. Lester, B. D. Lester, and C. Y. Lester, and that one J. S. Elmore claimed said one-half interest in said two thousand acres of land under and through the said T. H., B. D. and C. Y. Lester, and by reason of said claim there is great danger of long and expensive litigation between the said heirs and the said J. S. Elmore, in order to prevent said litigation has offered to accept the sum of five hundred dollars in full payment for and satisfaction of his claim, and upon payment thereof in full to him to convey said undivided half interest in said two

thousand acres of land to said petitioner, James R. Thomas, in his own right, Sallie L. Avery, and said heirs of said W. H. Thomas, Jr., dec'd.

That your petitioner is of the opinion, and is advised and believes, and the said Sallie L. Patton and her husband, William H. Patton, who with your petitioner, J. R. Thomas, are the only adults interested in said land, are of the opinion that it is for the best interests of all concerned to accept the proposition of J. S. Elmore as above set forth on condition that he is able to show your petitioner that he is now the owner of whatever interest in said land passed to the said T. H. Lester, B. D. Lester and C. Y. Lester, by the deed or deeds of the said James W. Terrell, commissioner as aforesaid. That your petitioner is informed and believes there is also an outstanding claim adverse to your petitioner, his wards and his other co-tenants as to the four thousand acres of said land covered by grant No. 8234 in Graham Co. and among other adverse claims alleged against their title is one that the claimants have an older State Grant or older State Grants for said four thousand acre tract, but as your petitioner is advised and believes he in his own right, the said Sallie L. Avery, and the said heirs of W. H. Thomas, Jr., dec'd, have a complete equitable title to said lands by reason of the fact that the grant under which they claim, to-wit, No. 8234, was issued upon an older entry than the entry or entries upon which the grant or grants for said lands of said adverse claimants was or were issued, and that she is advised and believes it would materially promote the interests of the said wards, the said infants, if a proper prosecution were instituted and prosecuted in the proper court to remove and settle the claims of said adverse claimants to said lands and also have such of them as claim said land by a senior grant issued on a junior entry declared trustee or trustees for the benefit of the said Sallie L. Avery and your petitioner in his own right, and the said heirs of the said Wm. H. Thomas, Jr., dec'd.

38 And your petitioner further shows that the above named infants, his wards, *has* no property except the farm on which they live, and their undivided interest in the said lands hereinafter particularly described, and other wild land, uncleared, mountain land, which brings them no income, and the taxes of which is a burden upon them, and that they have no source of income other than the rents and profits of their home place, and that the rents and profits thereof are inadequate to the support and maintenance and to educate his said wards, the above named infants, according to their station in life, and in society, and he therefore believes that it would materially promote the interests of his said wards if said lands were sold for a reasonable and fair price, and the proceeds re-invested so as to provide an annual income for their support and education, but that the said lands cannot be sold for a fair price unless the outstanding adverse claims above mentioned are in some way settled and determined, and that his said wards have not the ready money necessary for the prosecution of the necessary suits, or to pay the sums necessary for a compromise of said claims. Your petitioner further shows that one J. S. Bailey, of the town of Way-

cross, Ga., in the County of Ware, offers to purchase the said lands at the price of two dollars and a half per acre, and upon the delivery to him of a good and sufficient title conveying all of said lands hereinafter described to pay in cash the price of all of said lands, except the part thereof which is claimed adversely as aforesaid, and as to that part thereof he offers to deposit the sum of two thousand five hundred dollars in the Battery Park Bank, at Asheville, N. C., to be delivered to the said Sallie L. Avery, your petitioner in his own right, the said Sallie L. Patton, and your petitioner as guardian of his said wards, the above named infants, to be divided among them according to their respective interests in said land whenever your petitioner, or his said wards, or his other co-tenants shall have determined in favor of your petitioner his said wards, and other co-tenants either by suit or compromise that they are the owners of such entries in said lands, two thousand acre tract as may have passed by the deed or deeds of said James W. Terrell, commissioner, to said T. H. Lester, B. D. Lester and C. Y. Lester, or any one, two or three of them, and in case your petitioner and his wards and his said co-tenants shall fail to obtain evidence or an adjudication that they are the owners of said interests conveyed by said Terrell as aforesaid, or shall obtain such evidence or adjudication, as to only a part of said lands, then the money so deposited in said bank shall be turned over to the petitioner, for himself and his said wards, and to his other co-tenants, in proportion to their several interests, in said lands to which it shall be established that the petitioner and his said wards and his said other co-tenants
39 have a clear and unencumbered title and the remainder shall be returned to the said J. S. Bailey, and that he will execute his note for the sum of ten thousand dollars payable to your said petitioner for himself, and his said wards, and to his said other co-tenants, in proportion to their several interests in said lands and payable when the said adverse claims to said four thousand acres tract are extinguished either compromise or by an adjudication, of a proper court, and in case it shall so turn out and be determined, that your petitioner and his said wards other co-tenants are the owners of only a part of said four thousand acre tract, then the said J. S. Bailey is to pay for that portion of said tract which your petitioner, and his said wards, and his said other co-tenants, shall establish a good and unincumbered title at the price aforesaid and upon the payment of such price for such portion of said tract the said note shall then be redelivered to the said J. S. Bailey for cancellation, that owing to the condition of the title to said lands your petitioner does not believe that said lands would bring a fair price at public auction, and that in his best judgment, the price offered by the said J. S. Bailey, is a full and fair price for said lands even if the title thereto were unquestioned, and that it would materially promote the interests of his said wards the above named infants if said lands should be sold to the said J. S. Bailey at the price upon the terms proposed by him as hereinbefore set forth. And your petitioner is willing to sell his own share in said lands at the price so offered and upon the terms so offered and he is informed and believes that such

of his co-tenants as are of age are willing to sell said lands at said price and on said terms, that your petitioner, J. R. Thomas, was on the 26th day of April, A. D., 1898, duly appointed guardian of the said infant children of said W. H. Thomas, Jr., dec'd, by the clerk of the Superior Court of Jackson County and filed his guardian bond as required by law with the said clerk, and is now the duly qualified and acting guardian of said infants. That the said lands situate in the Counties of Swain, and Graham, on both sides of the Tennessee River and bounded and more particularly described as follows:

Beginning on a black gum on which are old marks indicating a fallen spruice as a corner on the South bank of the Tennessee River at the mouth of slick rock creek, and in the State line and about one pole N. E. of the corner of No. 611, and runs with the state line S. 25 E. 293 poles to a dogwood on which are old pointer marks, indicating a fallen chestnut as a corner, and supposed to be a corner of No. 611; Then S. 55 W. crossing Tallahassa trail at 192 poles 208 poles to an old black oak, now down, still showing old marks. Then S. 10 W. 74 poles to a stake where an old chestnut corner formerly stood, then S. 26 P. to a pine stump an old pointers. Then S. 47 W. 48 P. to a white oak, old marked corner in the divide between Bear and Slick Rock Creeks. Then S. 18 W. 123 poles to three chestnuts, old corner, near top of hangover lead. Then S. 16 E. 256 poles to a chestnut on top of a ridge. Then N. 65 E. 206 poles to a forked black oak near top of a ridge, an old corner. Then N. 88 E. 46 poles to a chestnut oak an old corner. Then S. 55 E. crossing Bear Creek at 104 poles, and crossing left hand prong at 120 poles, and crossing the old Tallahassa trail 108 poles, and crossing Barkas Creek at 384 poles, in all 665 poles to a white oak in a cove, an old corner. Then N. 75 E. crossing deep creek at 232 poles, and crossing Tallahassa trail at 364 poles, in all 460 poles to a maple, now down, and pointers. Then N. 18 E. 117 poles to a spruce pine on a rock cliff, an old corner. Then N. 35 W. 45 poles to a chestnut oak an old corner on the bank of the Cheoa River. Then down said River with its meanders 453 poles to a leaning black gum on the bank of said river and on the line of No. 1727. Then with the line of No. 1727, 45 E. 86 poles to a chestnut oak on a rock cliff, an old corner. Then with the line of 1727, N. 20 W., crossing Robinsville, or Chetoah turnpike road at 86 poles, crossing meadow branch at 142 poles, in all 295 poles to a pine, the S. W. corner of No. 1728, Then N. 87 E. with the line of No. 1728, 304 poles to a small hickory in the N. W. corner of No. 595, on the South side of a ridge. Then S. 45 E., crossing Robbinsville or Cheoa road at 54 poles, 100 poles to a beech, the beginning corner of 1398, then S. 83 W. 136 poles, crossing Robbinsville and Cheoa Turnpikes at 113 poles to a post oak, and old corner, then S. 40 E. crossing said road at 10 poles, crossing branch at 20 poles, 127 poles to a chestnut oak near the top of the mountain. Then N. 82 E. 170 poles to a small hickory, on the line of No. 595. Then with the line of 595. S. 45 E. 120 poles to a chestnut oak, the S. W. corner of No. 595. Then N. 72 E. with the line of

595, 400 poles to a small white oak, the S. E. corner of No. 595. Then N. 40 W. with line of No. 595, 170 poles to a black oak, the N. E. corner of No. 595, and a corner of the Whitaker tract. Then W. with the line of the Whittaker tract and Rymer tract. 570 poles to the line of 1728. Then N. 20 W. 270 poles to a maple on the bank of the Tennessee River. Then up the Tennessee river with its meanders about one thousand five hundred and fifty poles to a hickory, the S. E. corner of No. 6703, in Swain County. Then with the line of the said last mentioned No. N. 20, E. 440 poles to a locust on the E. side of the "Luellen" branch, the N. W. corner of No. 6702. Then with the line of 6702 S. 432 poles to a chestnut oak on the N. bank of the Tennessee River. Then up said river with its meanders about 452 poles to a fallen white oak, marked as a corner the beginning corner of No. 6702, in Swain County.

41 Then N. with the line of 6702 140 poles to a pine stump. Then with the line of 6702, N. 20 E. crossing a branch at 76 poles, 180 poles to a chestnut on a rocky mountain side, the N. E. corner of No. 6702. Then W. with the line of 6702, crossing a branch at 66 poles, three hundred and twenty poles to a locust, the N. W. corner of 6702, and the N. E. corner of 6703. Then with the line of 6703, W. 274 poles to a white oak and service, near a small branch, then S. 20 W. 80 poles to a stake, the N. E. corner of No. 6708. Then with the line of 6708, N. 60 W. 80 poles to a chestnut on the side of the twenty mile creek. Then S. 20 W. 635 poles to a white oak and maple on the N. bank of the Tennessee River, S. E. corner of No. 6701. Then N. with the line of 6701 395 poles to a stake, the N. E. corner of 6701. Then N. 60 W. 320 poles to a chestnut oak, the N. W. corner of No. 6701, and the N. E. corner of 6700. Then with the line of 6700, 320 poles to a stake and pointers, the N. W. corner of 6700, and the N. E. corner of No. 6704. Then W. 320 poles to a locust and black oak, the 61 mile tree in the state line, the N. E. corner of No. 6684. Then with the state line and the line of No. 6684, S. 35, W. 140 poles to the public road, then S. 50 W. with the State line, and the line of 6684, 100 poles to a stake. Then with said State line, and the line of 684, 80 poles to a white oak and locust, the 62 mile tree in the State line, and N. E. corner of 6685. Then with the State line and the line of 6685 320 poles to a hickory, the 63 mile tree in the State line, and the N. E. corner of 6690. Then with the line of 660 and the State line, S. 30 140 poles to a pine. Then S. 65 W. with the line of 6690, and the State line, 170 poles to a white oak, the 64 mile tree in State line. Then with the line of 6690, and the State line, W. 60 poles to the Tennessee River. Then down said River with its meanderings to the beginning. Containing eleven thousand seven hundred and eighty acres, exclusive of the exceptions hereinafter contained.

Excepting however nine hundred and twenty-four acres lying within the boundary described above, and held adversely to your petitioner and his said wards, and his said other co-tenants by certain persons having superior titles to theirs and consisting of several tracts described or designated as follows: To-wit: A tract generally

known as the Andy Williams lot in Graham County, containing one hundred acres, two adjoining tracts known as the Rymer tracts, containing together two hundred acres, being in the said County of Graham, Tract No. 545, in Graham County, containing one hundred acres, Tract No. 25, in Swain County, containing one hundred and thirty-five acres, tract No. 26 in Swain Co. containing fifty-eight acres, tract No. 27 in Swain County, containing fifty-eight acres. That portion of tract No. 28 lying in Swain
42 County, lying within the boundary hereinbefore mentioned, there being about twenty-three acres of said tracts within said boundary. Tract No. 29 in Swain County containing fifty acres, two adjoining tracts, known as the Raby tracts lying in Swain County containing two hundred acres, and the lines and boundaries of the above described large boundary of land, as well as the bound-ry line of the lands above excepted, are fully shown on a certain map made by F. M. Lovingood, Surveyor, at the request of your petitioner, and the said J. S. Bailey, and for a clear understanding of the location of said lands special reference is hereby made to said map which is herewith filed and made a part of this petition. Your petitioner therefore prays the court to grant an order and decree authorizing and empowering him as the guardian of the said infant children of the said Wm. H. Thomas, Jr., dec'd, to accept the proposition of compromise offered by J. S. Elmore out of any funds that may come into the hands of your petitioner, as guardian of said infants, such part of the five hundred dollars required by said J. S. Elmore as the price of his claim to said lands, as is proportionate to the interests which the said infants will have in lands claimed by the said J. S. Elmore, after said compromise is effected, and further authorizing and empowering him as such guardian to accept the proposition of said J. S. Bailey as heretofore set forth, and to sell the interests of said infants in the large boundary of land heretofore described, to the said J. S. Bailey, at the price of and upon the terms offered by the said J. S. Bailey, as heretofore set forth, and that the court shall further direct him what disposition he shall make of that part of the purchase price of said land which shall come to his hand as such guardian by reason of such sale, the said sum to come into his hands as such guardian being five-sixths of one-third of the whole of the purchase price so offered by the said J. S. Bailey, for the whole of said lands.

JAMES R. THOMAS, *Petitioner.*

A. C. AVERY,
Att'y for the Petitioner.

J. R. Thomas, the petitioner above named, being duly sworn, says that the allegations contained in the foregoing petition are true of his knowledge, except as to the matters stated on information and belief and as to those he believes to be true.

JAMES R. THOMAS.

Sworn to and subscribed before me this the 15th day of April, 1903.

V. F. BROWN,
Clerk of the Superior Court.

43 NORTH CAROLINA,
Jackson County:

In the Superior Court.

Before the Clerk.

J. R. THOMAS, Guardian of Love Thomas, W. H. Thomas, Mariah Thomas, De Witt Thomas, Bryan Thomas, Minor Heirs of W. H. Thomas, Dec'd.

Order of Reference, Ex Parte.

This cause coming on to be heard from the petition of J. R. Thomas, Guardian of the above named minors, and infants, children of W. H. Thomas, Jr., dec'd, It is ordered by the court that it be referred to Felix E. Alley to inquire into the truth of the matters alleged in said petition, and he is hereby directed to cause such persons as he may deem proper to come before him, and them on oath to examine concerning the matters and things contained in said petition, and that he report to the court whether it would materially promote the interests of said wards, or infants to accept the proposition of compromise made by J. S. Elmore, and fully set out in the said petition, and whether the price offered by the said J. S. Bailey for the large boundary of land described in the said petition is a full and fair price for said land, and whether it would materially promote the interests of the above named infants to sell their interests in the said land for a share of said price proportionate to their interests in said lands, and upon the terms and conditions as set forth in the petition as offered by the said J. S. Bailey. This the 15th day of April, 1903.

V. F. BROWN,
Clerk Superior Court.

NORTH CAROLINA,
Jackson County:

Superior Court.

Before the Clerk.

J. R. THOMAS, Guardian of W. H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas, and Bryan Thomas, Minors under Twenty-one Years of Age, and Children of W. H. Thomas, Jr., Dec'd.

Affidavit of Andrew Patton.

Andrew Patton, being duly sworn, says: That he was from his earliest childhood a warm friend of W. H. Thomas, Jr.,
44 dec'd, and that the friendship between them continued unbroken up to the time of his death, and that in the late illness of the said W. H. Thomas, Jr., affiant went to live with the said

W. H. Thomas, Jr., and helped take care of him, and after his death remained with his children and cared for them and has had said children except the one now of age and married in his custody and under his control up to this date, that he has no financial or other personal interest in the result of this proceeding, but is greatly interested that the interests of the above named minors should be promoted in every possible way, that he is well acquainted with the lands described in the petition, having kept stock in the range thereon for over twenty-five years, that he has known them all his life, having often been over all parts of said lands, and having recently been over all parts of said lands, that he has heard the petition in this proceeding read, and that he believes the allegations therein contained are true, and that the opinions therein expressed by the petitioner are sound and well founded, especially does affiant believe that the price offered by the said J. S. Bailey as set forth in the said petition is a full and fair price for the lands therein, and especially does he believe that the interests of the said minor children of W. H. Thomas, Jr., dec'd, would be materially promoted by a sale of the said lands at the price and upon the terms offered by the said J. S. Bailey as set forth in the petition.

A. J. PATTON.

Sworn to and subscribed before me this the 15th day of April, 1903.

V. F. BROWN,
Clerk of the Superior Court.

NORTH CAROLINA,
Jackson County:

In the Superior Court.

Before the Clerk.

JAMES R. THOMAS, Guardian of Wm. H. Thomas, Mariah Thomas, De Witt Thomas, and Bryan Thomas, Infants under Twenty-one Years of Age, and Children of W. H. Thomas, Jr., Dec'd.

Ex Parte.

F. H. Leatherwood being duly sworn, says: That he is well acquainted with what is known as the Thomas lands in Swain and Graham counties, particularly described in the petition filed in the above proceedings and that in his opinion two dollars and a half per acre is a full and fair price, that a large amount of the best timber of the said land has been removed, that he is well — with the infant children of W. H. Thomas, Jr., dec'd, and that they have no source of income except the rents and profits of their farm in Jackson Co. and that said rents are inadequate to the support, maintenance and to educate said children, and that he verily believes the interests of the said infants would be materially promoted by a sale of said lands described in the petition at two

dollars and a half per acre upon the terms and conditions contained in the offer of J. S. Bailey, as set out in the petition.

F. H. LEATHERWOOD.

Sworn to and subscribed before me, this, 16th day of April, 1903.

FELIX E. ALLEY,
Referee and Notary Public.

NORTH CAROLINA,
Jackson County:

In the Superior Court.

Before the Clerk.

JAS. R. THOMAS, Guardian of Wm. H. Thomas, Love Thomas, De Witt Thomas, and Bryan Thomas, Infants under the Age of Twenty-one Years and Children of W. H. Thomas, Jr., Dec'd.

Ex Parte.

O. B. Coward being duly sworn, says: That he has never seen the lands described in the petition in the above entitled cause, but that he has been very near to said lands and knows the general quality or reputation of the lands in that section, and knows from general reputation what the general quality of said lands described in said petition is. That he is informed and believes that a great part of the best timber on said lands has been removed from said lands, That from what he has always heard of the character and quality of said lands he believes that two and one-half dollars per acre is the full value of said lands, and a fair price for the same. That the affiant within the last few days offered to take a less proportionate price for his interest in a large boundary of mountain land, which according to his best information is superior land to the land described in said petition, and which he knows is more accessible to the markets of the country. That he is acquainted with the circumstances of the children, minors, of W. H. Thomas, Jr., dec'd, and that they have no means of support without selling land, other than
46 the rents of their Jackson County farm, which are inadequate to support, maintain, and educate them in a manner suitable to their stations, and believes their interests would be materially promoted by a sale of the lands in said petition, at the price, and upon the terms offered by the said J. S. Bailey, as set out in the petition, and that in his opinion said lands would not bring so great a price at public auction.

O. B. COWARD

Sworn to and subscribed before me this the 16th day of April, 1903.

FELIX E. ALLEY,
Referee and Notary Public.

NORTH CAROLINA,
Jackson County:

In the Superior Court

Before the Clerk.

JAMES R. THOMAS, Guardian of Wm. H. Thomas, Lora Thomas, De Witt Thomas, and Bryan Thomas, Infants under Twenty-one Years of Age, and Children of W. H. Thomas, Jr., Dec'd

Ex Parte.

To the Superior Court of Jackson County:

The undersigned to whom it was referred to inquire into the truth of the matters alleged in the petition filed in the proceedings and report to the court whether it would materially promote the interests of the above named infants to accept the proposition of compromise made by J. S. Elmore, and set out in said petition, and whether the price offered by J. S. Bailey, for the large boundary of land described in said petition, is a full and fair price for said land and whether it would materially promote the interests of the said boundary of land for a share of said price proportionate to their several interests in land, and upon the terms and conditions set forth in said petition as aforesaid, as offered by the said J. S. Bailey, begs leave to report, that he has made careful inquiry as to the matters alleged in the petition, and finds that all the allegations in the petition are true. That among others of his efforts to find out the truth concerning the matters referred to him, he caused to come before him, Andrew Patton, E. H. Leatherwood, and O. B. Coward all men of high character, good judgment, and well acquainted with the parties interested, and their circumstances and with the property in question, and reduced their statements to writing and caused them to be sworn as to the truth of the statements and herewith files their affidavits as a part of this report. He further reports that it would materially promote the interests of the said infants, to accept the proposition of compromise made by J. S. Elmore. That the price offered by J. S. Bailey for said land is a full and fair price for said land, and that it would materially promote the interests of the said infants to sell their interests in said land for a share of said price proportionate to their interests in said lands and upon the terms and conditions set forth in the said petition as offered by the said J. S. Bailey.

This 17th day of April, 1908.

FELIX E. ALLEY, *Referee.*

NORTH CAROLINA,
Jackson County:

In the Superior Court.

Before the Clerk.

JAMES R. THOMAS, Guardian of W. H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas, and Bryan Thomas, Children of W. H. Thomas, Dec'd.

The above entitled proceeding coming on to be heard, and being heard, upon the petition, affidavits and reports of the referee, it is now found and adjudged by the court that J. R. Thomas, is the duly appointed and acting Guardian of W. H. Thomas, Love Thomas, De Witt Thomas and Bryan Thomas, infants and children of Wm. H. Thomas, Jr., dec'd. That it would materially promote the interests of said infants to accept the proposition of compromise offered by J. S. Bailey, fully set out in the petition filed in this proceeding. That the price offered by the said J. S. Bailey for the large boundary of land described in the said petition is the full value of said land, and a full and fair price for the same. That it would materially promote the interests of the said infants to sell their interests in said land for a share of said price proportionate to their interests in said lands.

And it is now therefore ordered, adjudged and decreed by the court that the said J. R. Thomas, Guardian as aforesaid, is authorized and empowered to accept the proposition of compromise of the said J. S. Elmore, and upon the performance on his part of said proposition, by the said J. S. Elmore, out of any funds now in his hands or which may hereafter come into his hands as such Guardian, such part of the five hundred dollars required by the said J. S. Elmore, as the price of his claim to the lands claimed by him, as is pro-
48 portionate to the interests which said infants will have in said lands, claimed by said Elmore, after said compromise is effected. It is further ordered, adjudged and decreed that the said J. R. Thomas, Guardian as aforesaid, be and he is hereby authorized and empowered to accept the offer of the said J. S. Bailey to purchase the lands described in the petition as said offer is set forth in the petition, and that the payment to him as Guardian for and on account of the said infants, by the said Bailey of the sum of four thousand seven hundred and eight and *and* thirty-three and one-third cents, in cash, and depositing with the Battery Park Bank of Asheville, N. C., the sum of six hundred and ninety-four and forty-four one hundredth dollars to be delivered to said Guardian for the benefit of said infants whenever it shall be established by sufficient chain of title or by proper adjudication that the said infants, Sallie E. Avery, and her husband, A. C. Avery, Sallie Patton, and her husband, Wm. Patton, have rightfully conveyed to J. S. Bailey in fee simple such interest in the land claimed by J. S. Elmore, as passed to T. H. Lester, P. D. Lester, and C. Y. Lester, by the deed or

deeds of James W. Terrell, commissioner, referred to in the petition the said J. R. Thomas shall execute a deed in fee simple to said J. S. Bailey for the interests of the infants in the said lands described in the petition, and lying in Swain County and Graham Co. on both sides of the Tennessee river and bounded as follows:

Beginning on a black gum on which are old marks indicating a fallen spruce as a corner on the S. bank of the Tennessee River at the mouth of Slick Rock creek, and in the State line and about one pole N. E. of the corner of No. 611, and runs with the State line S. 25 E. 293 poles to a dogwood on which are old pointer marks, indicating a fallen chestnut as a corner, of No. 611; Then S. 55 W. crossing Tallahassa trail at 192 poles 208 poles to an old black oak, now down, still showing old marks. Then S. 10 W. 74 poles to a stake where an old chestnut corner formerly stood, then S. 26 P. to a pine stump an old pointers. Then S. 47 W. 48 P. to an old white oak, old marked corner in the divide between Bear and Slick Rock Creeks. Then S. 18 W. 123 poles to three chestnuts, old corner, near top of hangover lead. Then S. 16 E. 256 poles to a chestnut on top of a ridge, an old corner. Then N. 65 E. 206 P. to a forked black gum near top of a ridge, an old corner. Then 88 E. 46 p. to a chestnut oak an old corner. Then S. 55 E. crossing Bear Creek at 104 poles, and crossing left hand prong at 120 poles, and crossing the old Tallahassa trail at 180 P. and crossing Barkas Creek at 384 poles, in all 665 poles to a white oak in a cove, an old corner. Then N. 75 E. crossing deep creek at 232 poles, and crossing Tallahassa trail at 364 poles, in all 460 poles to a maple, now
49 down, and pointers. Then N. 18 E. 117 p. to a spruce pine on a rock cliff, an- then N. 35 W. 45 p. to a chestnut oak old corner on the bank of the Cheoa River. Then down said River with its meanders 453 p. to a leaning black gum on the S. bank of said river and on the line of No. 1727. Then with the line of No. 1727, N. 45 E. 86 p. to a chestnut oak on a rock cliff, an old corner. Then with the line of 1727, N. 20 W., crossing the Robinsville, or Cheoah turnpike road at 86 p. crossing meadow branch at 142 p. in all 295 p. to a pine, the S. W. corner of No. 1728. Then N. 87 E. with the line of No. 1728, 304 p. to a small hickory in the N. W. corner of No. 595, on the S. side of a ridge. Then S. 45 E., crossing Robbinsville or Cheoa road at 54 p., 100 p. to the beginning corner of 1398, then S. 83 W. 136 p. crossing the Robbinsville and Cheoa Turnpike road at 113 p. to a post oak, an old corner, then S. 40 E. crossing said road at 10 p. crossing branch at 20 p., 127 p. to a chestnut oak near the top of a mountain. Then N. 82 E. 170 p. to a small hickory, on the line of No. 595. Then with the line of 595. S. 45 E. 120 p. to a chestnut oak, the S. W. corner of 595. Then N. 72 E. with the line of 595, 400 p. to a white oak, the S. E. corner of No. 595. Then N. 40 W. with line of 595, 170 p. to a black oak, the N. E. corner of 595, and a corner of the Whitaker tract. Then with the line of the Whittaker tract and Rymer tracts 570 p. to the line of 1728. Then with the line of 1728 N. 20 W. 270 p. to a maple on S. *the* bank of the Tennessee River. Then up the Tennessee river with its meanders about one thousand five hun-

dred and fifty-nine p. to a hickory, the S. E. corner of No. 6703, in Swain County. Then with the line of 6703 N. 20 E. 440 p. to a locust on the E. side of the "Luellen" branch, the N. W. corner of 6702. Then with the line of 6702 S. 432 p. to a chestnut oak on the N. bank of the Tennessee River. Then up said river with its meanders about 452 p. to a fallen white oak, marked as a corner the beginning corner of 6702, in Swain county. Then N. with the line of 6702 140 p. to a pine stump. Then with the line of 6702, N. 20 E. crossing a branch at 76 p., 180 p. to a chestnut on a rocky mountain side, the N. E. *E.* corner of No. 6702. Then W. with the line of 6702, crossing a branch at 66 p., three hundred and twenty p. to a locust, the N. W. corner of 6702, and the N. E. corner of 6703. Then with the line of 6703, W. 276 p. to a white oak and service, near a small branch, then S. 20 W. 80 p. to a stake, the N. E. corner of #6708. Then with the line of 6708, N. 60 W. 380 p. to a chestnut on the E. side of the Twenty Mile creek. Then S. 20 W. 635 p. to a white oak and maple on the N. bank of the Tennessee River, S. E. corner of No. 6701. Then N. with the line of 6701 390 poles to a stake, the N. E. corner of 6701. Then N. 60 W. 320 p. to a chestnut oak, the N. W. corner of 6701, and the N. E. corner of 6700. Then with the line of 6700, 320 p. to a stake and pointers, the N. W. corner of 6700, and the N. E. corner of 6704. Then W. 320 p. to a locust and black oak, the 61 mile tree in the state line, the N. E. *the N. E.* corner of 6684. Then with the state line and the line of No. 6684, S. 35 W. 140 p. to the public road, then S. 50 W. with the State line, and the line of No. 6684, 100 p. to a stake. Then with said State line, and the line of No. 6684, 80 p. to a white oak and locust, the 62 mile tree in the State line, and N. E. corner of No. 6685. Then with the State line and the line of No. 6685 320 p. to a hickory, the 63 mile tree in the State line, and the N. E. corner of No. 6690. Then with the line of 6690 and the State line, S. 30 W. 140 p. to a pine. Then S. 65 W. with the line of 6690, and the State line 120 p. to a white oak the 64 mile tree in the State line. Then with the line of 6690, and the State line, W. 60 p. to the Tennessee River. Then down said River with its meanders to the beginning. Containing eleven thousand seven hundred and eighty acres, exclusive of the exceptions hereinafter contained

Excepting, however, 924 acres, lying within the above described boundary and held adversely to your petitioner, his said wards and his other co-tenants by certain persons having superior titles to theirs and consisting of several tracts described or designated as follows, to-wit: a tract generally known as the Andy Williams lot in Graham Co. containing 100 acres. Two adjoining lots known as the Rymer tracts, containing together 200 acres lying in the said County of Graham, tract #545 in Graham County, containing 100 acres, Tract #25 in Swain County, containing 130 acres, tract #26 in Swain Co., containing 50 acres, tract #27 in Swain Co., containing 58 acres, that portion of tract #28 in Swain County lying within the boundary hereinafter described, there being about 23 acres of said tract within said boundary. Tract #29 in Swain Co., containing

50 acres, two adjoining tracts known as the Rabe tracts in Swain Co., containing 200 acres, and the lines and boundaries of the above described large boundary of land as well as the boundary line of the lands excepted are fully shown on a certain map made by F. M. Lovingood, surveyor, at the request of the petitioner and the said J. S. Bailey, and for a clear understanding of the location of said lands excepted reference is hereby made to said map, which is filed with and made a part of the petition in the proceedings. And the said J. R. Thomas, Guardian as aforesaid upon the delivery of the deed as above authorized, shall take from the said J. S. Bailey his note securing for the benefit of the said infants the sum of one thousand one hundred and eleven dollars and eleven cents payable when the adverse claims to the four thousand acre tract re-
51 ferred to in the petition are extinguished either by adjudication of the proper court, or by compromise, and that said note shall be properly secured by mortgage or deed in trust on said four thousand acre tract.

This the 16th day of April, 1903.

V. F. BROWN
Clerk of the Superior Court.

The foregoing order of V. F. Brown, Clerk of the Superior Court of Jackson County, in the 16th Judicial District of N. C. is this day submitted to me the undersigned judge of the Superior Court of N. C. now holding the courts of said District, and I hereby approve and confirm the same order and decree.

This April 18, 1903.

W. B. COUNCIL, *Judge.*

NORTH CAROLINA,
Jackson Co.:

Superior Court.

Before the Clerk.

James R. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas and Bryan Thomas, Infants under the Age of Twenty-one Years and Children of W. H. Thomas, Jr., Dec'd.

To the Superior Court of Jackson County:

J. R. Thomas, Guardian of Wm. H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas, and Bryan Thomas, infants under the age of twenty one years, and children of W. H. Thomas, Jr., dec'd, beg leave to report to the court that by virtue of authority vested in him by a decree and order of the Superior Court of said County of Jackson, rendered in the above entitled action on the 16th day of April, 1903, by his Honor, W. B. Council, Judge of the Superior Court of N. C., holding the courts of the 16th Judicial District, in which said County of Jackson is situate, he sold the interests of the said infants in the lands described in said decree and

order and in the petition filed in said proceeding to J. S. Bailey, as authorized in said decree and order and upon the terms and conditions contained in said decree and order, except that he has obtained a contract by which in addition to the price in said order and decree for the said infants' interests in the land described in the decree, he has received in part, and is to receive as to the unpaid balance 8 per cent. interest on the share of said price from the 26th day of Jan., 1903, the time when the said J. S. Bailey's offer
52 of purchase was made up to the time of payment or deposit of the price, and that he has been paid by the said J. S. Bailey on the price of said infants' interests in said land and now holds as Guardian of such infants the sum of four thousand seven hundred and eight dollars, and 83½ cents with interest thereon from the 26th day of Jan'y, 1903, to the 18th day of April, 1903, to-wit: The sum — four thousand seven hundred and seventy-three and 30-100 dollars, and that the said J. S. Bailey has deposited in the Battery Park Bank the sum of twenty-five hundred dollars to be paid to the said Guardian and the co-tenants of his ward or wards, and be distributed among them in proportion to their several interests in said lands whenever the conditions set forth in said decree and order upon which said money was to be paid to them has been complied with by the said persons among whom the money is to be distributed, as aforesaid, and that he has received from the said J. S. Bailey in connection with the other interests in said lands, his, the said J. S. Bailey's, note for the said infants' share in which amounts to the sum of twenty-seven hundred and seventy-seven dollars and seventy-eight cents bearing interest from the 26th day of Jan'y, 1903, secured by a deed in trust on the four thousand acre tract mentioned in the said decree and order as required by said decree and order, and that the said J. S. Bailey and the said J. R. Thomas, Guardian as aforesaid has complied in all respects with the requirements of said order and decree, and he, the said J. R. Thomas, Guardian as aforesaid, has executed a deed with the other co-tenants in common of said land in which he has conveyed all the right, title and interest of said infants in said lands described in said order and decree, and said petition as aforesaid, and that he asks the court now to adjudge and decree whether his action in the execution of said deed and whether the said sale shall be confirmed. He further reports that he has discovered an error in calculation made by the court set forth in said decree, in that said decree fixes the interest of said infants in the said deferred payments and note at the sum of eleven hundred and eleven dollars and eleven cents. This interest in deferred payments amount- to the said sum of two thousand seven hundred and seventy-seven dollars and seventy-eight cents. He therefore suggests that the said decree be amended now so as that this amount will correspond with the terms upon which said decree directed said lands to be sold.

This the 2ond day of May, 1903.

JAMES R. THOMAS,
Guardian of W. H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas, and Bryan Thomas.

53 NORTH CAROLINA,
Jackson County:

In the Superior Court.

Before the Clerk.

James R Thomas, Guardian of Wm. H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas, and Bryan Thomas, Infants under the Age of Twenty-one Years and Children of W. H. Thomas, Jr., Dec'd.

The above entitled proceedings coming on to be heard, and it appearing from the report of J. R. Thomas, Guardian of the above named infants, to-wit: Wm. H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas, and Bryan Thomas, infants under twenty-one years of age and children of W. H. Thomas, Jr., dec'd, that he sold the interests of the said infants in the lands described in the petition filed in the said proceeding and in the decree and order rendered in said proceeding on the 16th day of April, 1903, to J. S. Bailey, at a price a little in advance of the price mentioned in said decree and on the terms authorized in said decree and order, and that the said J. S. Bailey and J. R. Thomas, Guardian aforesaid, has severally done and performed all this as required by said decree and order to be done before the execution of a deed for said interest in said lands, and that the said J. R. Thomas, Guardian as aforesaid, pursuant to authority in said decree and order contained did execute a deed, dated the 18th day of April, 1903, conveying said interests in said lands to J. S. Bailey. It is now ordered, adjudged and decreed, that said report of J. R. Thomas, Guardian aforesaid and the said sale of said interests in said land to the said J. S. Bailey be and the same is hereby in all respects ratified, confimed, and approved.

It is further ordered that the decree and order of sale hereinbefore made in this proceeding, to-wit: on the 16th day of April, 1903, be amended by striking out on the last page of said decree the words, eleven hundred and eleven dollars and eleven cents and inserting in lieu thereof the words two thousand seven hundred and seventy-seven dollars and seventy-eight cents.

This the 2ond day of May, 1903.

V. F. BROWN,
Clerk of the Superior Court.

The foregoing decree and order of confirmation of V. F. Brown, Clerk of the Superior Court of Jackson Co. in the 16th Judicial District of N. C. is this day submitted to me, the undersigned Judge of the Superior Court of N. C., now holding the courts of said district, and I hereby approve, ratify, and confirm said order and decree.

W. B. CONCIL, *Judge.*

54 I, V. F. Brown, Clerk of the Superior Court in and for the County of Jackson, State of N. C., do hereby certify the foregoing to be a true copy of the above entitled proceedings as the same appears on record in my office.

Witness my hand and seal, this the 22nd day of April, 1909.

[Seal of the Superior Court of Jackson County, North Carolina.]

V. F. BROWN,
Clerk of Superior Court.

Endorsed: Certified copy in re J. R. T. Certified copy of record in re J. R. Thomas to J. S. Bailey.

We also wish to offer a deed executed April 18th, 1903, by J. R. Thomas and wife, Josephine Thomas, A. C. Avery and wife, Sallie L. Avery, William Patton and wife, Sallie Patten, and J. R. Thomas, Guardian of William H. Thomas, Love Thomas, De Witt Thomas, and Bryan Thomas all infants under twenty-one years of age, and children of William H. Thomas, Jr., deceased; the said J. R. Thomas, Guardian as aforesaid, acting as such Guardian under and by virtue of authority conferred on him by decree and order of the Superior Court of Jackson County.

(Exhibit "B.")

PLAINTIFF'S EXHIBIT "B."

Certified Copy of Deed James R. Thomas et al. to J. S. Bailey.

U. S. Circuit Court. Filed Nov. 29, 1909. W. S. Hyams, Clerk.

This Indenture, made and entered into this the 18th day of April, A. D., 1903, by and between J. R. Thomas, and his wife, Josephine Thomas, of the County of Haywood, in the State of North Carolina, A. B. Avery and his wife, Sally L. Avery, of the County of Burke, in the said State of North Carolina, William Patton and wife, Sally Patton of the County of Jackson, in the State of North Carolina, and the said J. R. Thomas, Guardian of William H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas and Bryan Thomas, infants, under twenty-one years of age, and children of William H. Thomas, Jr., deceased, residing in the County of Jackson and said State of North Carolina, the said J. R.
55 Thomas, Guardian as aforesaid acting as such guardian in the execution of these presents under and by virtue of the authority conferred on him by a decree and order of the Superior Court of said County of Jackson rendered by the Clerk of said Court on the 16th day of April, 1903, in a certain special proceeding then pending before him, entitled James R. Thomas, guardian of William H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas and Bryan Thomas, infants under twenty-one years of age and children of W. H. Thomas, deceased, ex-parte, the said order and decree having been this day affirmed and approved by his Honor, W. B. Council, a Judge of the Superior Court of North Carolina, now holding the courts of the 16th Judicial District of

said State in which District the said County of Jackson is situated, parties of the first part, and J. S. Bailey, of the town of Waycross, in the County of Ware, in the State of Georgia, party of the second part, Witnesseth: that the said parties of the first part for and in consideration of the sum of twenty-nine thousand eight hundred and fifty-one and 71-100 ($29,851.71) dollars, to them in hand paid, the receipt whereof is hereby acknowledged, have given, granted, bargained, sold, conveyed and confirmed, and by these presents do give, grant, bargain, sell, convey and confirm unto the said J. S. Bailey, his heirs and assigns forever, a certain tract and parcel of land situate, lying and being in the County of Swain, and Graham, in the said State of North Carolina, on both sides of the Tennessee River and bounded and more particularly described as follows:

Beginning at a black gum on which are old marks indicating a fallen spruce as a corner on the South bank of the Tennessee River at the mouth of Slick Rock Creek and in the State line and about one pole North-East of the corner of No. six hundred and eleven (611) and runs with the State line South twenty-five (25) degrees East two hundred and ninety-three (293) poles to a dogwood on which are old pointers marks indicating a fallen chestnut as a corner, and supposed to be a corner of No. six hundred and eleven (611); thence South fifty-five (55) degrees West crossing Talasse trail at one hundred and ninety-two (192) poles two hundred and eight (208) poles to an old black oak corner, now down, still showing old marks; thence South ten (10) degrees West seventy-four (74) poles to a stake where an old chestnut corner formerly stood; thence South twenty-six (26) poles to a pine stump and old pointers; thence South forty-seven (47) degrees West forty-eight (48) poles to a white oak, old marked corner on the divide between Bear and Slick Rock Creeks; thence South eighteen (18) degrees West one hundred and twenty-three (123) poles to three chestnuts, old corner near top of Hangover Lead thence South sixteen (16) de-
56 grees East two hundred and fifty-six (256) poles to a chestnut on top of a ridge an old corner, thence North sixty-five (65) degrees East two hundred and six (206) poles to a forked black oak near top of a ridge, an old corner; thence North eighty-eight (88) degrees East, forty-six (46) poles to a chestnut oak, an old corner; thence South fifty-five (55) degrees East crossing Bear Creek at one hundred and four poles, and crossing the old Talasse trail at one hundred and eighty poles, and crossing Barkers Creek at three hundred and eighty-four poles, in all six hundred and sixty-five poles, to a white oak in a cove an old corner; thence North seventy-five (75) degrees East crossing Deep Creek at two hundred and thirty-two poles, and crossing Talasse trail at three hundred and sixty-four poles in all four hundred and sixty poles to a maple, now down, and pointers; thence North eighteen (18) degrees East one hundred and seventeen (117) poles to a spruce pine on a rock cliff an old corner; thence North thirty-five (35) degrees West forty-five poles to a chestnut oak, an old corner on the bank of Cheoah River; thence down said river with its meanders four hundred and fifty-three poles to a leaning black gum on the South bank of said river, and on the line of No. of seventeen hundred and

twenty-seven (1727); thence with the line of No. seventeen hundred and twenty-seven North forty-five (45) degrees (45) degrees East eighty-six poles to a chestnut oak on a rock cliff, an old corner, thence with the line of No. 1727 North twenty (20) degrees West crossing Robbinsville on Cheoah Turnpike Road at eighty-six poles crossing Meadow Branch at one hundred and forty-two poles, in all two hundred and ninety-five poles to a pine, the South-West corner of No. 1728; thence North eight-seven degrees East with the line of No. 1728 three hundred and four poles to a small hickory, the North West corner of No. 595 on the South side of a ridge; thence South forty-five (45) degrees East crossing Robbinsville on Cheoah Turnpike at fifty-four poles one hundred poles to a beech, the beginning corner of No. 1398; thence South eighty (80) three (83) degrees West one hundred and thirty-six poles, crossing the Robbinsville on Cheoah Turnpike at one hundred and thirteen poles to a post oak and old corner; thence South forty (40) degrees East crossing said road ten poles crossing a branch at twenty poles one hundred and twenty-seven poles to a chestnut oak near the top of a mountain; thence North eighty-two (82) degrees East one hundred and seventy poles to a small hickory on the line of No. 595; thence with the line of No. 595 South forty-five East one hundred and twenty poles to a chestnut oak, the South-West corner of No. 595; thence North seventy-two (72) degrees East with the line of No. 595 four hundred poles to a small white oak the South-East corner of No. 595; thence North forty (40) degrees West with the line of
57 No. 595 one hundred and seventy poles to a black oak, the North East corner of No. 595 and a corner of the Whitaker tract; thence West with the line of the Whitaker tract and Ryner tracts five hundred and seventy poles to the line of No. 1728; thence with the line of No. 1728 North twenty (20) degrees West one hundred and seventy poles to a maple on the South bank of the Tennessee River; thence up the Tennesse Rivr with its meanders about one thousand five hundred and fifty-nine (1559) poles to a hickory, the South East corner of No. 6703 in Swain County; thence with the line of said last mentioned number (6703) North twenty (20) degrees East four hundred and forty poles to a locust on the East side of the Luellen Branch the North West corner of No. 6702; thence with the line of No. 6702 South four hundred and thirty-two poles to a chestnut oak on the North bank of Tennessee River; thence up said river with its meanders about four hundred and fifty-two poles to a fallen white oak marked as a corner the beginning corner of No. 6702 in Swain County; thence north with the line of No. 6702 one hundred and forty poles to a pine stump; thence with the line of No. 6702 North twenty (20) degrees East crossing a branch at seventy-six poles one hundred and eighty poles to a chestnut on a rocky mountain side, the North East corner of No. 6702; thence West with the line of No. 6702 crossing a branch at sixty-six poles three hundred and twenty poles to a locust, the North West corner of No. 6702 and the North East corner of 6703; thence with the line of No. 6703 West two hundred and seventy-four poles to a white oak and service near a small

branch; thence South twenty (20) degrees West eighty poles to a stake, the North East corner of No. 6708; thence with the line of No. 6708 North sixty (60) degrees West three hundred and eighty poles to a chestnut on the East side of Twenty Mile Creek; thence South twenty (20) degrees West six hundred and thirty-five poles to a white oak and maple on the North bank of the Tennessee River South East corner of No. 6701; thence North with the line of No. 6701 three hundred and ninety poles to a stake, the North East corner of No. 6701; thence North sixty (60) degrees West three hundred and twenty poles to a chestnut oak the North West corner of said No. 6701, and the North East corner of No. 6700; thence West with the line of No. 6700 three hundred and twenty poles to a stake and pointers, the North West corner of No. 6700 and the North East corner of No. 6704; thence West three hundred and twenty poles to a locust and black oak the sixty-one mile tree in the State line the North East corner of No. 6684; thence with the State line and the line of No. 6684 South thirty-five (35) West one hundred and forty poles to the public road; thence fifty (50) degrees West with the State line and the line of No. 6684 one
58 hundred poles to a stake; thence West with said State line and the line of No. 6684 eighty poles to a white oak and locust the sixty-two mile tree in the State line and North East corner of No. 6685; thence with the State line and the line of No. 6685 three hundred and twenty poles to a hickory the sixty-three mile tree in the State line, and the North East corner of No. 6690; thence with the line of No. 6690; and the State line South thirty (30) degrees West one hundred and forty poles to a pine; thence South sixty-five (65) degrees West with the line of No. 6690 and the State line one hundred and seventy poles to a white oak the sixty-four mile tree in the State line; thence with the line of No. 6690 and the State line West sixty poles to the Tennessee River; thence down the said River with its meanders to the beginning, containing eleven thousand seven hundred and eighty (11780) acres, exclusive of the exceptions hereinafter contained, excepting, however, nine hundred and twenty-four acres lying within the above described boundary and held adversely to the parties of the first part by certain persons having superior title to theirs, and consisting of several tracts described or designated as follows, to-wit: a tract generally known as the Andy Williams lot in Graham County containing one hundred acres; two adjoining tracts known as the Ryner tracts, containing together two hundred acres, being in the said County of Graham. Tract No. 545 in Graham County, containing one hundred acres. Tract No. 25 in Swain containing one hundred and thirty-five acres. Tract No. 26 in Swain County containing fifty-eight acres. Tract No. 27 in Swain County containing fifty-eight acres, that portion of tract No. 28 in Swain County lying within the boundary hereinbefore described, there being about twenty acres of said tract within said boundary. Tract No. 29 in Swain County containing fifty acres, Two adjoining tracts known as the Raby tracts, lying in Swain County, containing two hundred acres and the lines and boundaries of the above described boun-

dary of land as well as the boundary line of the lands above excepted are fully shown on a certain map made by F. M. Lovingood surveyor at the request of said J. R. Thomas and J. S. Bailey and filed in the office of the clerk of the Superior Court of Jackson County as a part of the petition in the said special proceeding had in the County of Jackson, State of North Carolina, entitled James R. Thomas, Guardian of William H. Thomas, Love Thomas, Mariah Thomas, Dewitt Thomas and Bryan Thomas, infants under twenty-one years of age, and children of W. H. Thomas, Jr., deceased, ex parte, and for a clear understanding of the location of said lands and the lands excepted reference is hereby made to said map filed as aforesaid.

To have and to hold the said lands and premises unto the said J. S. Bailey, his heirs and assigns to his and their only use
59 and behoof forever, and the said J. R. Thomas in pursuance of a contract heretofore made by him with the said J. S. Bailey, based on a valuable consideration, hereby covenants with the said J. S. Bailey, his heirs and assigns, that he, the said J. R. Thomas is lawfully seized in fee simple of one undivided third of said land and has full right to convey the same, and that the said Sallie L. Avery, is lawfully seized of an undivided third of said land, and has full right to con ey the same, and that the said Sally Patton is lawfully seized of an undivided eighteenth of said land and has the right to convey the same, and that William H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas and Bryan Thomas are seized of one undivided five-eighths of said land, and that he as their guardian has full right and power to sell and convey their said undivided five-eight-s interest in said land, and has hereby conveyed the same, and he further covenants that said land is unincumbered, except as to minerals and mining privileges claimed adversely to the parties of the first part, and as to such minerals and mining privileges, no part of this warranty shall apply, and he further covenants that he will, and his heirs, executors and administrators shall forever warrant and defend the said land and premises and the title thereto, except as the said minerals and mining privileges) not only as to share hereby conveyed by him in his own right, but as to the entire land and all interests therein herein conveyed or intended to be conveyed against the lawful claim of all persons whomsoever.

In witness whereof, the said parties of the first part have hereunto set their hands and seals this the said 18th day of April, A. D., 1903.

JAS. R. THOMAS. [SEAL.]
JOSEPHINE S. THOMAS. [SEAL.]
A. C. AVERY. [SEAL.]
SALLIE L. AVERY. [SEAL.]
SALLIE PATTON. [SEAL.]
W. D. PATTON. [SEAL.]
JAS. R. THOMAS, [SEAL.]
Guardian of William T. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas, and Bryan Thomas.

Attest as to J. R. Thomas, Guardian:
J. S. ADAMS.

60 STATE OF NORTH CAROLINA,
County of Haywood:

I, Wm. T. Blaylock, Notary Public of Haywood County, do hereby certify that J. R. Thomas, and wife, Josephine Thomas, and J. R. Thomas, Guardian of William H. Thomas, Love Thomas, Mariah Thomas, De Witt Thomas and Bryan Thomas, personally appeared before me this day, and acknowledged the due execution by them of the foregoing deed, and the said Josephine Thomas, being by me privately examined separate and apart from her husband touching her voluntary execution of the said deed, doth state that she signed and executed the same freely and voluntarily without fear, compulsion or undue influence of her said husband, or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and notarial seal this the 18 day of April, A. D., 1903.

[NOTARIAL SEAL.] WM. T. BLAYLOCK,
Notary Public.

STATE OF NORTH CAROLINA,
County of Buncombe:

I, Frederick W. Thomas, Notary Public for the County of Buncombe, State of North Carolina, do hereby certify that A. C. Avery and wife, Sallie L. Avery, personally appeared before me this day and acknowledged the due execution by them of the foregoing deed, and the said Sallie L. Avery being by me privately examined separate and apart from her said husband, touching her voluntary execution of the same, does state that she signed the same freely and voluntarily without fear, compulsion or undue influence of her husband, or any other person, and that she doth still voluntarily assent thereto. Witness my hand and official seal this the 18th day of April, A. D., 1903.

[NOTARIAL SEAL.] FREDERICK W. THOMAS,
Notary Public.

STATE OF NORTH CAROLINA,
County of Jackson:

I, John R. Green, a Justice of the Peace in and for the County of Jackson, do hereby certify that Wm. Patton and his wife, Sallie Patton, personally appeared before me this day, and acknowledged the due execution by them of the foregoing deed, and that the said Sallie Patton being privately examined separate and apart
61 from her said husband touching her voluntary execution of the same, doth state that she signed and executed the same freely and voluntarily without fear, compulsion or undue influence of her said husband, or any other person, and that she doth still voluntarily assent thereto.

Witness my hand and private seal this the 20th day of April, A. D., 1903.

JOHN R. GREEN, [SEAL.]
Justice of the Peace in and for Jackson County, North Carolina.

NORTH CAROLINA,
Jackson County:

I hereby certify that John R. Green was at the time of signing the foregoing certificate a Justice of the Peace in and for the County of Jackson and State of North Carolina, and that his signature thereto is in his own proper handwriting. In witness whereof, I hereunto set my hand and seal of office this 20th day of April, A. D., 1903.

[SEAL OF COURT.] V. F. BROWN,
Clerk Superior Court, Jackson County, N. C.

NORTH CAROLINA,
Buncombe County:

I, Alfred S. Barnard, a Notary Public in and for the County of Buncombe and State of North Carolina, do hereby certify that on the 23rd day of April, 1903, personally appeared before me, James R. Thomas, Guardian of William H. Thomas, Love Thomas, Mariah Thomas, DeWitt Thomas and Bryan Thomas, and acknowledged due execution by him as such guardian of the foregoing and annexed deed.

In testimony whereof, I have hereunto set my hand and affixed my Notarial Seal on this the day and year last above written.

[NOTARIAL SEAL.] ALF. S. BARNARD,
Notary Public, Buncombe County.

STATE OF NORTH CAROLINA,
Swain County:

The foregoing certificate of William T. Blaylock, a Notary Public of Haywood County, and State of North Carolina with his Notarial Seal attached; and the foregoing certificate of Frederick W. Thomas, a Notary Public of the County of Buncombe and State of North Carolina, with his Notarial Seal attached; and the foregoing certificate of John R. Green, a Justice of the Peace of Jackson County and State of North Carolina, with his private seal attached, and the foregoing certificate of V. F. Brown, clerk of the Superior Court of Jackson County, North Carolina, with his official seal attached; and the foregoing certificate of Alfred S. Barnard, a Notary Public of the County of Buncombe and State of North Carolina, with his Notarial Seal attached, are all and every of them adjudged to be correct, in due form and according to law, and the foregoing deed is adjudged to be duly proven. Therefore, let the foregoing deed and said certificates and this certificate be registered. This the 5 day of May, 1903.

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A. J. HALL,
Clerk Superior Court, Swain County, North Carolina.

Filed for registration May 5th, 1903, at 9 A. M. and registered May 5th, 1903, at 2 P. M.

R. W. WRIGHT,
Register of Deeds.

NORTH CAROLINA,
Swain County:

I, W. L. Francis, Register of Deeds for Swain County, North Carolina, do hereby certify that the foregoing is a full, true and accurate copy of a deed from J. R. Thomas and others to J. S. Bailey together with all certificates of acknowledgement, probate and registration thereto attached, which said deed together with the certificates is recorded in Book X, at page 275, et seq. of the deed records of Swain County, N. C.

Witness my hand and official seal this the 19 of April, 1909.

[SEAL.] W. L. FRANCIS,
Register of Deeds.

STATE OF NORTH CAROLINA,
Graham County:

The foregoing certificates of William T. Blaylock, a Notary Public of Haywood County, State of North Carolina, with his Notarial Seal attached and the foregoing certificate of Frederick W. Thomas, a Notary Public of Buncombe County, State of North Carolina,
63 with his Notarial Seal attached, and the foregoing certificate of John R. Green, a Justice of the Peace of Jackson County and State of North Carolina, with his private seal attached, and the foregoing certificate of V. F. Brown, Clerk of the Superior Court of Jackson County, North Carolina, with his official seal attached, and the foregoing certificate of Alfred S. Barnard, a Notary Public of the County of Buncombe and State of North Carolina, with his Notarial seal attached, are all and every of them adjudged to be correct, in due form and according to law; and the foregoing deed is adjudged to be duly proven. Therefore let the foregoing deed and said certificates and this certificate be registered. This the 7th day of May, 1903.

R. V. McELROY,
Clerk Superior Court of Graham County, N. C.

The foregoing deed of conveyance was this day duly registered in the office of Register of Deeds for Graham County, in Book "L" of Deeds on page 342.

Witness my hand this the 7th day of May, 1903.

ROBT. B. SLAUGHTER,
Register of Deeds Graham County, N. C.

NORTH CAROLINA,
Graham County:

I, Robt. B. Slaughter, Register of Deeds for Graham County, North Carolina, do hereby certify that the foregoing instrument of writing is a full, true and accurate copy of a deed from James R. Thomas, A. C. Avery et als. to J. S. Bailey, together with all certificates of acknowledgment, probate and registration thereto attached, which said deed, together with the certificates is registered

in the office of Register of Deeds for Graham County, North Carolina, in Book "L" of Deeds on page 342.

Witness my hand and official seal this the 20th day of April, 1909.

[SEAL.] ROBT. B. SLAUGHTER,
Register of Deeds, Graham County, N. C.

Endorsed: James R. Thomas et al. to J. S. Bailey. Certified Copy of Deed. Plff. "B."

May it please your Honor, I now offer deed made by J. S. Bailey and wife, Mattie May Taylor Bailey, dated the 26th day of September, 1906, to C. H. Rexford (Exhibit "C").

64 PLAINTIFF'S EXHIBIT "C."

Certified Copy Deed J. S. Bailey and Wife to C. H. Rexford.

U. S. Circuit Court. Filed Nov. 29, 1909. W. S. Hyams, Clerk.

STATE OF NORTH CAROLINA,
Swain County:

This Indenture, made and entered into this the 26th day of September, A. D., 1906, by and between J. S. Bailey and Mattie May Taylor Bailey, wife of the said J. S. Bailey, of the County of Ware and State of Georgia, parties of the first part, and C. H. Rexford, of the County of Potter and State of Pennsylvania, party of the second part: Witnesseth: that the said parties of the first part for and in consideration of the sum of sixty-six thousand three hundred and seventy-five dollars to them in hand paid by the said party of the second part, the receipt whereof, is hereby acknowledged, have given, granted, bargained, sold, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns forever, all of that certain standing and growing timber hereinafter described and tract or parcel of land situate, lying and being in the State of North Carolina, in the Counties of Swain and Graham on both sides of the Tennessee River, being known as the Thomas land, and being more particularly bounded and described as follows, to-wit:

Beginning at a white oak on the state line, the sixty-four mile tree and runs with the line between North Carolina and Tennessee, N. 83½ E. 14 poles; thence N. 62 E. 20 poles, N. 51° E. 13 poles; thence N. 11° E. 20 poles; thence N. 57° E. 32 poles; thence N. 75 E. 51 poles; thence N. 25° W. 24 poles. thence N. 44° E. 24 poles passing a fallen pine at 16 poles; thence N. 22½° W. 14 poles; thence N. 22½° E. 14 poles; thence N. 63° E. 9 poles; thence N. 40° E. 24 poles; thence N. 23° E. 8 poles; thence N. 79° E. 14 poles; thence N. 44½° E. 32 poles; thence N. 23° E. 26 poles; thence N. 56½° E. 8 poles; thence N. 15° E. 14 poles; thence N. 74° E. 7 poles to a hickory marked as a corner; thence N. 62° E.

36 poles; thence N. 80° E. 14 poles; N. 61° E. 18 poles; thence S. 79° E. 12 poles; thence N. 62° E. 20 poles; thence N. 73½° E. 34 poles; thence S. 79° E. 38 poles; thence N. 55½° E. 26 poles; thence N. 62° E. 12 poles; thence S. 80° E. 16 poles; thence
65 N. 48° E. 20 poles; thence N. 67½° E. 10 poles; thence N. 89° E. 40 poles; thence S. 58½° E. 16 poles to an old white oak corner in the gap of the mountain; thence S. 74° E. 32 poles; thence N. 56° E. 26 poles; thence S. 77½° E. 30 poles; thence N. 46° E. 12 poles; thence N. 65½ E. 16 poles; thence N. 26½° E. 14 poles; thence N. 62½° E. 8 poles; thence N. 31° E. 18 poles; thence N. 77½° E. 14 poles; thence N. 38° E. 8 poles; thence N. 67° E. 30 poles crossing Welche's old turnpike road at 25 poles; thence N. 10 E. 32 poles; thence N. 37° E. 30 poles; thence N. 46° E. 40 poles; thence N. 9½° E. 16 poles to a Spanish oak on the State line, marked as a corner; thence with the line of tract No. 6704 East crossing the pole bridge branch at 142 poles, 320 poles to a stake in a small hollow, a small chestnut, small black oak, and small hickory, marked as corners; thence S. 78 poles to a stake, and pointers the Northwest corner of tract No. 6700; thence East with that line crossing a small branch at 72 poles Judas' branch at 95 poles 320 poles to a Spanish oak near the top of a ridge; thence N. 6 poles to a chestnut oak on a steep hill side, the Northwest corner of tract No. 6701; thence with that line S. 60° E. crossing a small branch at 18 poles the West fork of Twenty Mile Creek at 115 poles, the East fork, at 210 poles, 320 poles to a chestnut oak, near the top of the ridge; thence South crossing a small branch at 50 poles 426 poles to a Maple on the bank of Tennessee River the Southwest corner of tract No. 6708; thence with that line N. 20° E. 640 poles to a chestnut near the bank of Twenty Mile Creek; thence S. 60 E. 380 poles to a stake and pointers near the top of the ridge; thence S. 20 W. 60 poles to a stake and double chestnut on a steep hill side, the Northwest corner of tract No. 6703; thence with that line East 314 poles to the West line of tract No. 6702; thence with that line North 30 poles to the Northwest corner of tract No. 6702; thence with that line East 260 poles; thence South 20 West 58 poles to a stake; thence South 140 poles to a fallen white oak on the Northwest bank of the Tennessee River; thence down said River with its meanders to a cucumber, the Northeast corner of tract No. 29; thence with that line S. 86° W. 95 poles to a stake; the Northwest corner of said number; thence South 88 poles to a Horn-Beam on the bank of the Tennessee River, a corner of tract No. 29; thence down the river with its meanders to a chestnut oak on the bank of the river, the Southwest corner of tract No. 6702; thence with the line of tract No. 6702, North 185 poles to the line of tract No. 28; thence with that line West 35 poles to the line of tract No. 6703; thence with that line S. 20 W. 183 poles to a stake on the bank of the river the Southeast corner of tract No. 6703; thence down the river with its meanders to a sweet gum the Southeast corner of tract No. 25; thence with that line North 45° E. 195 poles to a
66 chestnut, a corner of tract- No. 25 and 26; thence with the line of tract No. 26 N. 34 poles to a beech on the bank of the branch; thence West 154 poles to a pine op a ridge, thence S.

30° W. 140 poles to a beech on the Bank of the Tennessee River the Southwest corner of tract No. 25; thence down the river with its meanders to a small tract No. 25; thence down the river with its meanders to a small maple on the bank of the river, the Southwest corner of tract No. 6708 and the Southeast corner of tract No. 6701; thence crossing the river to a spruce pine on the South bank of the Tennessee river the Northeast corner of tract No. 1075; thence with that line S. 20° E. 63 poles to a stake; thence S. 75° W. 5 poles to a white oak; thence S. 10° W. 8 poles to the line of tract No. 595; thence with line S. 55° E. 64 poles to the Southeast corner of said Number 595; thence with that line S. 70° W. 65 poles to the line of tract No. 1075; thence with that line S. 3° E. 12 poles to a chestnut in a field; thence S. 58° W. 205 poles to a black oak; thence S. 15° W. 60 poles to a chestnut oak; thence S. 25° W. 28 poles to chestnut; thence S. 82° W. 71 poles to a chestnut oak; thence N. 55° W. 51 poles to a locust; thence N. 50 poles to a small hickory; thence N. 80° E. 20 poles to a hickory, thence N. 10° E. 22 poles to a stake in the line of tract No. 595; thence with that line S. 70° W. 30 poles to the Southwest corner of said tract No. 595; thence with that line N. 50° W. 110 poles to the Southeast corner of tract No. 1398; thence with that line S. 80° W. 180 poles to the Southwest corner of said number; thence with that line N. 40° W. 127 poles to a post oak Northwest corner of said number; thence with said line N. 80° E. 110 poles to the line of tract No. 292; thence with that line N. 72° W. 195 poles to the line of tract No. 1728; thence with that line S. 85° W. 155 poles to a pine, corner of said number on the line of said tract No. 1727; thence with the line of said Number 1727 S. 20° E. crossing the Robbinsville road at 139 poles 226 poles to a chestnut oak on a rock; thence with that line S. 45 W. 106 poles to a black gum on the South bank of the Cheoah River; thence up the river with its meanders to a chestnut oak on the South bank of said River; thence S. 35° E. 40 poles to a spruce pine; thence S. 15° W. 104 poles to a maple; thence S. 70° W. 440 poles to a white oak in a Cove; thence N. 60° W. 640 poles to a chestnut oak crossing East fork of Bear Creek at 520 poles and the West Fork at 536 poles; thence S. 85° W. 40 poles to a forked black oak; thence S. 65° W. 194 poles to a chestnut on top of the ridge; thence N. 20° W. 234 poles to five chestnuts; thence N. 15° E. 116 poles to a white oak on top of the divide between Bear Creek and Slick Rock Creek; thence N. 45° E. 46 poles to a pine; thence N. 24 poles to a chestnut; thence N. 10 E. 74 poles to a black oak; thence N. 53° E. 208 poles to a chestnut; thence
67 N. 25° W. 70 poles to the corner of tract No. 611; thence with that line N. 65° E. 120 poles to a stake on the South bank of the Tennessee River; thence down said River, with its meanders to a stake on the North Bank of said River in the North Carolina and Tennessee Lines; thence with that line East 60 poles to the Beginning, containing 13265 acres more or less.

Excepting however, the following described tracts:

First Exception: Bounded as follows: Beginning at a stake in the Western boundary line of the above described land at a point in said land North of the Tennessee River, and 300 vertical feet higher

than the surface of said river at a low water where the Tennessee State line crossed the river and runs with a level contour line Eastwardly until it strikes the Eastern boundary line of the above described lands; thence southwardly with the said Eastern boundary line to the Tennessee River; thence down said river with its meanders to the Northeast corner of that part of the above described land, which lies in the County of Graham; thence Southwardly with the Eastern boundary of the above described land to a stake at a point exactly level with the beginning; thence Westwardly on a level contour line and on a level with the last mentioned corner to a stake in the Western boundary line of the above described land at a point level with the beginning; thence with the said Western boundary line to the beginning. It being intended to except from the operation of this deed a strip of land lying on both sides of the Tennessee River and bounded by level lines crossing the Western boundary line of the above mentioned lands at points 300 vertical feet higher than the surface water of the Tennessee River at the place where the State line crosses it, and by the Eastern and Western boundary lines of the above described lands; and excepting further and reserving to the said J. S. Bailey, his heirs and assigns forever, all the water power on the Cheoah River upon any part of the lands herein conveyed, with the right to develop and use the same and the right to build and use any and all such dams as he, his representatives or assigns may see fit and the right to build, construct, maintain, operate and use all such canals, tunnels and flumes on any part of the land herein conveyed that he, his executors, administrators or assigns shall deem necessary for the full development of the water power on the said Tennessee River, and Cheoah River and the right to back the waters of said River upon any part of the land herein conveyed, or any land which the party of the second part may own, to an extent that may be necessary to the full and best development of all the water power on said rivers, and the right to take, use and appropriate for the purpose of developing said water powers any and all such rock, earth and sand and all such timber growing on any part of the lands herein conveyed of the tim-
68 bers herein conveyed under the size of twelve inches at the butt, when cut as he, his representatives or assigns may deem necessary for the development of said water powers, the materials above mentioned to be taken from any part of the lands herein conveyed and with such rights of way and the right to use and construct such roads over and upon any part of the lands herein conveyed, as he, the said J. S. Bailey, his representatives or assigns may deem necessary to transfer said material to the points where they are to be used, or in order to transfer materials and machinery from the railroads to the place where it is to be used for the development of said water powers, and the right to construct, build, maintain and operate over any part of the lands herein conveyed. All such pole lines as may be needed for the transmission of the electricity to be generated by said water powers when developed, and also the right to build, construct and operate a railroad over, across and upon any part of said lands herein conveyed, together with all such rights in connection with such rights of way for such railroad as could be

obtained by any railroad company organized under the general railroad laws of North Carolina by the exercise of the right of eminent domain.

Second Exception: Known as the Raby tract and bounded as follows: Beginning at a large white oak on the bank of the Tennessee River just below a large rock between the road and the river, and runs North crossing Twenty Mile Creek at 54 poles 112 poles to a birch; thence S. 83° W. crossing Judas' Branch at 118 poles passing a chestnut corner at 126 poles. 219 poles to a pine on the side of a ridge; thence S. 20° W. 94 poles to a stake on the bank of Tennessee River; thence up the river with its meanders to the Beginning.

Third Exception: Bounded as follows: Beginning on a spruce pine on a rock and runs West 180 poles to a small hickory on a hill side; thence South 90 poles to a chestnut on a North hillside. thence East 180 poles to a chestnut sapling; thence North 20 poles to the beginning, and being tract No. 545.

Fourth Exception: Being tract No. 237, and bounded as follows: Beginning on a locust and a black gum and runs N. 70° W. — poles to a large chestnut on top of a ridge; thence North 120 poles to three chestnuts; thence East 82 poles to a large dead pine near the top of a ridge; thence S. 60° E. 110 poles to a small pine; thence S. 47° W. 130 poles to the beginning, and known as the Colvard tract.

Fifth Exception: Being tract No. 1399 and bounded as follows: Beginning at a black oak and runs S. 10° E. 65 poles to a Spanish oak; thence East 180 poles to a stake; thence N. 10° W. 90 poles to a stake; thence West 180 poles to a locust; thence S. 10° E. 25 poles to the Beginning, and known as the Williams tract:

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And the said parties of the first part for the consideration aforesaid do further give, grant and convey unto the said party of the second part, his heirs and assigns forever, all the timber of every description now standing and growing upon such parts of the lands described in the first exception, as lies outside the boundaries of the Raby tract hereinbefore described as the second exception, and of the tract known as the Jenkins tract with the right to construct, use and operate upon such parts of said lands described in said first exception as lie outside of the said boundaries of said Raby and said Jenkins tracts, and such mills or temporary houses as he may need in his operation of handling and manufacturing timber on the lands herein conveyed, including the right to build and use such railways, tramways and wagon ways over and across such excepted land as may be necessary in the handling and manufacturing of this timber. Also the right to cross and recross by foot, boat, float, or team either or both of said rivers for the purpose of removing said timber from one side to the other, it being the intent of the parties that no part of said Raby tract or the tract known as the Jenkins tract, or any interest in either of them or any right or privilege over, touching or concerning either of them is given or conveyed by this deed, or by any construction that may be put upon this deed or any part thereof, but the foregoing conveyance of the timber on said excepted land and the right and privi-

lege granted in connection therewith are given and granted upon the express condition that he, the said C. H. Rexford, his representatives or assigns, will cut and remove such timber and so use the privileges of occupying said excepted land at such times and in such manner as not to interfere in any way with the development by the said J. S. Bailey, his representatives or assigns of the water powers on said rivers according to his or their own judgment.

To have and to hold, the lands, timbers, easements, rights and privileges herein conveyed and granted (subject to the exceptions hereinbefore made and to the rights and privilges hereinbefore reserved) unto the said party of the second part, his heirs and assigns forever, and the said parties of the first part do hereby covenant with the said party of the second part, his heirs and assigns that the said parties of the first part are lawfully seized of the lands, timber and easements hereinbefore conveyed, and have a right to convey the same, and that the same are free from all liens and encumbrances, and that they will and their heirs, executors and administrators shall, *shall forever* warrant and defend the title to said land, timber and easements unto the said party of the second part, his heirs and assigns forever, against the lawful claims of all persons whomsoever, provided, however, that this covenant shall not apply to any mineral or mining privileges on the lands hereby conveyed and shall not apply to the following described boundary of said land, or any part thereof, except tract-26, 27, and 28 hereinafter embraced in the last provision of this deed that may be within the boundaries herein conveyed, to-wit:

Beginning: on a sweet gum on the bank of the Tennessee River, the Southeast corner of tract No. 25, and runs with the line of that tract N. 45° E. 195 poles to a chestnut, corner of tracts No. 25 and 26, with the line of No. 26 North 34 poles to a beech on said line on the bank of a branch thence with the line on tract No. 25 West 60 poles to a stake on said line thence N. 25° E. 110 poles to a stake; thence East 510 poles to a stake on the East line of Tract No. 6702; thence with that line South 135 poles to a fallen white oak on the North Bank of the Tennessee River thence down said river with its meanders to a cucumber, the Northeast corner of tract No. 29; thence S. 86° W. 95 poles to a stake, the Northwest corner of said number 29; thence South 28 poles to a Horn Beam on the bank of the river; thence down the river with its meanders to the Beginning.

And that the parties of the first part will forever warrant and defend the title to the lands, timber and easements hereinbefore conveyed, except the minerals and mining privileges therein, and except the boundary last above described unto the said party of the second part, his heirs and assigns forever, against the lawful claims of all persons whomsoever, and this covenant so far as it applies to the four thousand acre tract No. 920, is subject to the provisions contained in a deed of trust this day executed by the said party of the second part, provided, however, that this covenant of warranty except as to minerals and mining privileges shall apply to such parts of tracts Nos. 26-27 and 28, as lie within the above exceptions to the covenant of warranty and outside of the lands excepted from the operation of this deed.

In witness whereof, the said parties of the first part have hereunto set their ands and seals this the day and year first above written.

J. S. BAILEY, [SEAL.]
MATTIE MAY TAYLOR BAILEY. [SEAL.]

STATE OF GEORGIA,
County of Floyd:

I, James E. McConnell, a Notary Public in and for the County of Floyd and State of Georgia, do hereby certify that Mattie
71 May Taylor Bailey, wife of J. S. Bailey, this day personally appeared before me and acknowledged the due execution by her of the foregoing and annexed deed of conveyance. Thereupon the said Mattie May Taylor Bailey, being by me privately examined separately and apart from her said husband touching her voluntary execution of the same, doth state that she signed the same freely and voluntarily without fear or compulsion — her said husband or any other person, and that she doth still voluntarily assent thereto. Witness my hand and official seal this the 22nd day of October, A. D., 1906.

[NOTARIAL SEAL.] JAMES E. McCONNELL,
Notary Public.

(My commission expires April 1st, 1907)

STATE OF GEORGIA,
County of Ware:

I, C. M. Williams, a Notary Public in and for the County of Ware, and State of Georgia, do hereby certify that J. S. Bailey this day personally appeared before me, and acknowledged the due execution by him of the foregoing and annexed deed of conveyance. Witness my hand and official seal this 18th day of October, A. D., 1906.

[NOTARIAL SEAL.] C. M. WILLIAMS,
Notary Public.

STATE OF NORTH CAROLINA,
County of Swain:

The foregoing certificate of C. M. Williams, a Notary Public in and for the County of Ware and State of Georgia, and Jas. E. McConnell, a Notary Public in and for the County of Floyd and State of Georgia, duly authenticated by their official seals, are adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of conveyance is adjudged to be duly proven. Let the foregoing and annexed deed of conveyance, together with said certificates and this certificate be registered. This 23 day of November, 1906.

O. P. WILLIAMS,
Cerk Superior Court for County of Swain.

Filed and registered November 23rd, 1906.

R. W. WRIGHT,
Register of Deeds.

72 NORTH CAROLINA,
Swain County:

I, W. L. Francis, Register of Deeds for Swain County, North Carolina, do hereby certify that the foregoing writing is a full, true and accurate copy of a deed from J. S. Bailey to C. H. Rexford, together with all certificates of acknowledgment, probate and registration thereto attached, which said deed, together with the certificates is recorded in Book "AC" at page 339 et seq. of the Deed Records of Swain County, N. C.

Witness my hand and official seal this the 19 day of April, 1909.

[SEAL.] W. L. FRANCIS.

STATE OF NORTH CAROLINA,
County of Graham:

The foregoing certificate of C. M. Williams, a Notary Public in and for the County of Ware and State of Georgia, and Jas. E. McConnell, a Notary Public in and for the County of Floyd, and State of Georgia, duly authenticated by their official seals, are adjudged to be correct, in due form and according to law. And the foregoing and annexed Deed of Conveyance is adjudged to be duly proven.

Let the foregoing and annexed Deed of Conveyance together with said certificates and this certificate be registered. This the 26th day of November, A. D., 1906.

R. V. McELROY,
Clerk Superior Court for Graham County.

Filed for registration on the 26th day of Nov., 1906, and registered in the office of Register of Deeds for Graham County, N. C., in Book "P" of Deeds on page 219, etc. This 27th day of Nov., A. D., 1906.

ROBT. B. SLAUGHTER,
Register of Deeds.

NORTH CAROLINA,
Graham County:

I, Robt. B. Slaughter, Register of Deeds for Graham County, North Carolina, do hereby certify that the foregoing instrument of writing is a full, true and accurate copy of a deed from J. S. Bailey & wife to C. H. Rexford, together with all certificates of acknowledgment, probate and registration thereto attached, which said deed, together with the certificates is registered in the office of
73 Register of Deeds for Graham County, North Carolina, in book "P" of Deeds, on page 219.

Witness my hand and official seal this the 20th day of April, 1909.

[SEAL.] ROBT. B. SLAUGHTER,
Register of Deeds, Graham County, N. C.

Endorsed: J. S. Bailey & wife to C. H. Rexford, certified copy. C.

Mr. Fry then asked Judge Merrimon for the papers referred to above for use as introduction of evidence to which Judge Merrimon replied: "I will not let you file them, but you may refer to them and hold them back."

Mr. FRY: I suppose they are the same thing.

Mr. MERRIMON: I do not care to let you have them for filing.

Mr. FRY (Continuing): The plaintiff reserving the right to make objection to this whole record, or any part or parts thereof, and to establish the right to object to the introduction of any part of the record beyond page 22 this record, now offers the records in the case of W. H. Hilliard, Guardian of W. H. Thomas, filed before the Probate Court in Jackson County, North Carolina, for the purpose of attacking this proceeding for any purpose which they may seem proper; and more especially for the reason that it is absolutely void so far as the loss of the timber described in the pleadings in this case are concerned. This is filed for this purpose only; to show that this is the cloud which we wish to remove from this hearing. (Exhibit "D".)

PLAINTIFF'S EXHIBIT D.

Petition of Hilliard, Guardian, etc.

U. S. Circuit Court. Filed Nov. 29, 1909. W. S. Hyams, Clerk.

Be it remembered that on the 17th day of May, 1880, a petition was filed in the office of the Judge of Probate for the County of Jackson and State of North Carolina in words and figures as follows, to-wit:

74 STATE OF NORTH CAROLINA,
County of Jackson:

In the Probate Court.

In the Matter of WILLIAM H. THOMAS, Lunatic.

The petition of W. L. Hilliard, Guardian of W. H. Thomas, respectfully showeth:

That on or about the 15th day of May, 1877, the said William H. Thomas, of said County upon the proper process of law was duly adjudged a lunatic, since which time he has been confined in the Asylum for the Insane in the City of Raleigh, where he is maintained as a pauper.

2. That on the 5th day of April, 1878, your petitioner was duly appointed guardian of said W. H. Thomas, and gave bond, as required by law.

3. That at the time of the inquisition and finding of the said lunacy, the said W. H. Thomas, was the owner of many tracts and parcels of land in the Counties of Haywood, Jackson, Swain, Macon, Graham, Clay and Cherokee, a description of which complete as it

is now — of your petitioner to make it, in his Ex. — appended marked "A" and prayed to be taken as a part of this petition.

That a large majority of these tracts are isolated, wild mountain lands of little value, their rents and profits insufficient to pay the taxes, while other and more valuable tracts have been entered, grants taken on them, and trespasses committed, thus involving serious litigation, and by this, casting clouds upon the title, greatly lessening and diminishing their supposed value.

4. That the said W. H. Thomas possessed no personal property except certain bonds and notes, the solvency of which is doubtful which are set forth and described in a schedule marked "B" hereto appended, and prayed to be made part of this petition.

5. That at the time of said inquisition, the said W. H. Thomas was largely indebted to various persons, a schedule of said indebtedness being hereto appended, which is as complete as it is now in the power of your petitioner to make it, and marked "C", and prayed to be taken as a part of this petition.

5. Par. cont'd. That he is also informed and believes that many of these creditors of said Lunatic will take as payment of said indebtedness due to them, lands at a fair valuation belonging to said lunatic, while others, if the cash were paid them would make a fair reduction on the amounts due them.

6. That your petitioner is informed and believes a number of important suits for the recovery of valuable property, as well as defend said Lunatic's rights in the premises, are now depending, and others are necessary to be begun in behalf of said Lunatic, and still others likely to arise, in which it is necessary to make a defence in his behalf, in the Counties of Jackson, Cherokee, Swain and elsewhere, where the real estate of the said Lunatic lies, and in the course of the management of and settlement of said Lunatic's estate, your petitioner is advised and believes that he will find it necessary to institute and defend a number of important suits in this and other States, and your petitioner alleges that he is wholly unprovided with any means with which to prosecute or defend existing suits or hereafter arise.

7. That the only available income from said Lunatic's estate is the rental of the Stekoah farm on the Tuckasegee River in the County of Jackson, which is about one hundred and sixty bushels of corn, and fifty bushels of wheat per annum, and that this farm is threatened to be involved in litigation by virtue of certain entries made thereon since the lunacy of the said W. H. Thomas.

8. That a forced sale of the property of the said Lunatic would not realize sufficient to satisfy his debts, and would leave his family and himself without adequate means of support.

9. That the children and only heirs at law of the said W. H. Thomas are William H., Jr., now of age; James R., age 19 years, and Sarah L. Thomas, aged 17 years.

10. That your petitioner since his appointment as Guardian aforesaid, having no available means from the estate of the said Lunatic, has advanced and paid the sum of twelve 50-100 dollars for the benefit of said Lunatic, and has also advanced and paid for the

maintenance and education of the infant children of the said Lunatic the sum of four hundred and fifty dollars, which is reasonable, in consideration of their station in life.

11. That there is yet due and owing on account of the support of the said Lunatic and the maintenance and support of said infant children and costs accruing in litigation in the protection of
76 said Lunatic's property *in* the sum of two thousand dollars.

Whereupon your petitioner prays:

1. That an account may be taken to inquire and ascertain of what the estate of the said W. H. Thomas consisted at the inquisition of the said Lunacy.

2. Of what the said estate does now consist.

3. That a proper sum may be appropriated and settled for the maintenance and support of the said Lunatic —•— —— indebtedness already incurred — the support and maintenance — future.

And that a proper sum may be settled and approved for the maintenance and support of the said infant children, in the future, as well as the indebtedness of the past, and that the said sum so reported as necessary for the maintenance and support of the said Lunatic may be paid to this guardian out of the estate of the said Lunatic, and that the sum so settled and approved for the support and maintenance of the said infant children be paid to the Guardian of said children out of said Lunatic's estate.

5. And that the expenses, costs and fees of the litigation now depending, and likely hereafter to arise, may be ascertained and reported and the said sum allowed and paid to this petitioner as the Guardian of said Lunatic.

That it may be ascertained the amount of the indebtedness of the said W. H. Thomas, to whom due, and in what amounts, and to this end, that notice may be issued by advertisement in a newspaper or otherwise, as the court may direct, for all creditors of said W. H. Thomas, within a time appointed, to come in and prove their debts.

6. Par. Cont'd. And that the Commissioner appointed by this court may have full authority (after provision is made for said Lunatic's support and maintenance and that of his infant children, as well as for costs, by setting aside a sum for that purpose) to arrange and pay off said indebtedness, either by a sale of such part of the remaining estate as may be left, and the payment of the amounts so received on said indebtedness, or by transferring such lands and other property at a fair valuation, to be fixed by two or more indifferent persons, to the creditors of said lunatic in liquidation of said claims.

77 7. That it may be ascertained and reported the present nature of the Real and Personal Estate of the said W. H. Thomas.

8. That it may be ascertained and reported the kind, character and probable expenses of the litigation now pending, in behalf of or against the said Lunatic's estate, and what further litigation may arise hereafter or become necessary in the course of the proper management of said estate, and to provide a fund for the payment of the same.

9. That when said account shall have been taken and ascertained and said amounts allowed, approved and settled according to the prayer of this petition, that the said lands belonging to said Lunatic's estate, or so much thereof as may be necessary may be sold upon such time as the court may decree, and the amounts realized therefrom may be affixed to the discharge of the items of indebtedness and expense due as above set forth.

10. That a Commissioner may be appointed with full authority to sell at either private or public sale, and on such terms as the court may decree, any of the pieces or parcels of the real estate of said Lunatic, as the court may judge most available and proper to be sold, and that the said Commissioner may be required to report from time to time, as the court may direct, any sale made by him, and the terms thereof, and to pay over said sum of money as may be realized therefrom, as the court shall direct.

11. For the costs of this proceeding, and for such other and further relief as the nature and circumstances of the case may require.

J. L. HENRY,
Attorney for Petitioner.

STATE OF NORTH CAROLINA,
County of Buncombe:

Personally appeared before me, W. L. Hilliard, the petitioner herein, who being duly sworn, says that he has made the foregoing petition and knows the contents thereof, and that the same are true, except as to those facts he states on information and belief, and those he believes to be true.

W. L. HILLIARD, *Guardian.*

78 Sworn to and subscribed before me this 14 day of May, 1880.

E. W. HERNDON,
Clk. Superior Court.

On the reverse side of the foregoing petition appears the following: "In the matter of W. L. Hilliard, Guard., &c. Petition to set apart support for Lunatic. Filed 17th May, 1880."

Items of indebtedness of W. H. Thomas, a Lunatic, so far as can be ascertained by reference to the Court Dockets, and other available sources, viz:

Judgment in Supreme Court in favor of Adams (now belonging to I. M. Cooper, as I am informed) principal No. 18, 1853	$688.40
Int. 21 years	1,073.80
Making about	$1,762.20

In Jackson Sup. Court Docket:

To Louisa Bryson, Docketed Dec. 7th, 1876			$215.45
A. J. Williams and Thomas & Sherrill, Ap. 13th, 1874			167.50
H. J. Beck	"	Oct. 13th, 1873	297.92
R. H. Cannon	"	June 23, 1871	188.68
		Also in Haywood Dockets.	
E. C. Chastain	"	& Herron Ap. 18th, 1870	316.66

In Macon Sup. Court Dockets:

To D. C. Hardin cash M. & P.'s bank, Docket 4 Ap. 1870 ..... $4 260.26
Int. on $3,076.00 from 4 Ap., '70.

The judgments due Wm. and R. B. Johnston are also docketed in this Court.

In Swain Superior Court Docket:

Wm. Johnston to use of Commsr. of Indian Affairs.... $13,195.40
Int. on $11,212.48 from Fr. 15, Oct. 58, costs $5.55
Cr. on this $8,487.41
To Wm. Johnston (as above) $7,716.16
Int. on $5,000.00 from 10th June, '67, costs $12.95
To R. B. Johnston (as above $2,535.00
Int. on $2,000 fr. 11th Ap., '59, costs $34.16
Those fr. Buncombe Docketed 7th Feb., 1880.
Making an aggregate of (about) $9,054.21

79 This aggregate does not include the amounts due on the Johnston judgments, and which are specially provided for by decree of U. S. Circuit Court, at Asheville, N. C.

W. L. HILLIARD, *Guardian.*

And thereupon the following proceedings were had:

STATE OF NORTH CAROLINA,
Jackson County:

In the Probate Court.

In the Matter of W. H. THOMAS, Lunatic.

MAY 26TH, 1880.

This cause coming on to be heard before me this day on petition of W. L. Hilliard, Guardian, praying the court to assign and set aside a maintenance and support for the said Lunatic and his family being miners and being heard upon the petition, Inventory and Exhibits filed and upon the testimony admitted to the court and the same being fully considered, the court doth find as facts.

1st. That W. H. Thomas was duly declared a lunatic by due

process of law on or about the 15th day of May, 1877, since which time he has been confined to the Asylum for the Insane at the City of Raleigh, where he is — as a pauper.

2nd. That W. L. Hilliard was duly appointed Guardian of W. H. Thomas on the 5th day of April, 1878, and gave bond required by law. That the only heirs at law of W. H. Thomas are Wm. H. Thomas, Jr., now of full age, and James R. Thomas, aged 19 years, and Sarah L. Thomas, aged 17 years, the wife of the said Thomas and the mother of said children having died prior to the inquisition of said lunacy.

3rd. I find that the business of the said Lunatic from the confused management by him of the same since the year 1860 resulting from the mental condition incapacity and incompetency during the said interval, and the destruction of much valuable information concerning the affairs of the said Lunatic in burning and destroying his papers by his own hand in fits of mela-choly and depression, and otherwise by neglect and inattention, and by the destruction of valuable papers by the incursion of troops and robbers during and since the war, as well as by the long delay occasioned by the uncertain state of mind of said Lunatic for some years, thus raising presumption of payment in law and giving scope to the statute of limitations. All of these causes combined, together with others, left the property of the said lunatic and his business affairs at the date of
80 the said inquisition of lunacy in inextricable confusion. That he has been a man of large and varied business connections engaged in mercantile pursuits, having many stores; agriculture, having many farms; manufacturing in many and different ways; extensively engaged in real estate speculation, buying and selling; and for many years being agent for the Eastern or North Carolina Cherokee Indians, having their care and protection under his supervision, requiring much trouble and expense, and employing over half his time, and also for the last fifty years intimately connected with the political affairs of the country, holding many and lucrative positions under the federal and state governments, and holding the care of this estate, real and personal, as a secondary consideration, and leaving his papers, bonds, notes, accounts, receipts, &c., &c., at his various places of business in the Counties of Cherokee, Graham, Macon, Swain, Jackson and Haywood, so that it is almost next to impossible for anyone to have a fair and intelligent understanding of the condition of his affairs.

4th. That prior to the time of said inquisition of lunacy a litigation had been pending in the U. S. Circuit Court to which Wm. Johnston was plaintiff and Wm. H. Thomas was defendant, in which it was ascertained and decreed that the said Lunatic was indebted to the said Wm. Johnston and R. B. Johnston in the sum of ($33,887.11) thirty-three thousand eight hundred and eighty-seven 11-100 dollars, for which judgment had theretofore been rendered in the Superior Court and sales made by virtue of executions issuing thereon, and all the property, real and personal which could be found of the said lunatic brought to sale and purchased by the said Wm. Johnston. And that by an award of Arbitrators reported to the said

U. S. Circuit Court and therein confirmed the purchase made by the said Johnston, and the Sheriff's deeds thereunder *was* declared to be trusts for the benefit of said lunatic. And all the property thus sold and conveyed held subject to the payment of said debt, as well as the notes and choses of action belonging to the said lunatic, and Commissioners were appointed to make sales and collections and to pay off said judgment.

I find further that said judgments have all been paid, except the sum of about eight thousand dollars yet remaining due and unpaid, for which the entire estate of the said lunatic's property is held.

5th. I find as near as can be ascertained that the said lunatic owes on docketed judgments in various counties about the sum of (16,000) sixteen thousand dollars over and above the above mentioned Johnston judgments, and that there are many notes and claims made against his estate.

81 6th. I find that the real estate in which the said lunatic has an interest subject to the aforesaid Johnston judgment lien consists of a large number of small and isolated tracts of land in the various counties of Cherokee, Graham, Swain, Macon, Jackson and Clay, from fifty acres and upwards, amounting in the aggregate to about forty thousand acres, and ranging in value from fifty cents to two dollars per acre, if sold on time, but if forced into sale for cost, would not bring more than one-fifth of said amount.

7th. I find that the larger and more valuable tracts of land belonging to the said Thomas are involved in serious litigation, requiring large expenditures of money for the necessary costs fees and attention.

8th. I find that the property of the said lunatic does not yield enough in rents and profits to pay the taxes accruing thereon.

9th. I find that the notes due said estate over and above those included in the lien of the Johnston judgments are barred by the statute of limitations, uncollectible, and worthless, and that many of the notes included in the lien of the Johnston judgment given for land, have been permitted to run on interest so long, that they now far exceed in value the land for which they were given.

10th. I find that the indebtedness already accrued in the way of costs of litigation, fees, commissions, &c., and the support of the said Lunatic and his infant children up to this time is about the sum of $2,450.00.

11th. I find it will cost about the sum of four hundred dollars per annum for the support and subsistence of the said lunatic, and the further sum of about three hundred dollars per annum for each of his two minor children, making in the aggregate the sum of one thousand dollars per annum for the necessary current expenses of maintenance and support.

12th. I find that the litigation in which the guardian is necessarily engaged, is both extensive and expensive, and involves the title to much valuable property belonging to the estate, to the extent of nearly one-half of the value thereof, and that many suits will have necessarily to be brought in the immediate future in the dif-

ferant counties where the land lies, to expel trespassers and quiet title, involving an expense and cost which it is impossible at
82 this time to estimate, but safe to say cannot be less than one thousand to twelve hundred dollars per annum.

13th. I find there is a claim will be due said Thomas in expectancy of ten per cent. of a large amount for services rendered the North Carolina Cherokee Indians, but the realization of which is entirely dependent on future legislation of Congress and a judgment to be ascertained by a competent court, but which is too uncertain, vague and indefinite to be more than mentioned here.

It is therefore considered, adjudged and ordered by the court.

1st. That the sum of twenty-two hundred dollars per annum for two consecutive years be settled, approved and set aside for the support and maintenance and support of the said lunatic and his two minor children, and to pay taxes annually accruing, and for costs, fees of litigation, and other necessary expenses attending said estate.

2nd. It is further ordered that for the two consecutive years next following the above mentioned two years, the sum of nineteen hundred dollars per annum be settled, approved and set aside for the support and maintenance of the said lunatic and his then one minor child, and to pay taxes annually accruing, and for cost fees of litigation, and other necessary expenses attending said estate.

3rd. It is further ordered that for the one year next following the two years last above mentioned, the sum of sixteen hundred dollars be settled, approved and set aside for the support and maintenance of the said lunatic and to pay taxes annually accruing, and for costs of fees and litigation and other necessary expenses attending said estate.

4th. It is further ordered the Commissioners hereinafter to be appointed pay to the Guardian of said W. H. Thomas on or before the first day of January, 1886, the sum of five thousand dollars, if the said lunatic be then alive and not restored to his mental health, which shall be settled, approved and set apart for his future support and maintenance.

5th. It is further ordered that the sum of two thousand four hundred and fifty dollars be paid by said commissioner hereinafter to be appointed to defray expenses and meet liabilities already incurred since the above inquisition of lunacy.

6th. It is ordered that James W. Terrell of the county of Jack-
83 son be appointed Commissioner to make sale of the lands belonging to the said lunatic, selling first such as may be discovered not to be included in the above mentioned Johnston judgment lien and not involved in other litigation, and as may be most available, and from time to time such lands as are included in the Johnston judgment lien, and which may be discharged therefrom, either by payment of the said judgments, or by reconveyance of the said Johnston, until he shall realize the sum of (17,250.00) seventeen thousand two hundred and fifty dollars. And to this end

7th. It is ordered and adjudged that the said Commissioner

Jas. W. Terrell sell such lands at private sale on the terms one-fourth cash at the time of sale, and the balance in one and two (121) years equal installments, with interest from date, and that he report semi-annually the amount of such sales, to whom sold, at what date, the particular tracts sold, and the amounts received.

8th. It is ordered likewise that he have authority to collect any notes or other evidences of debt in his hands belonging to the said estate of Thomas, a lunatic, and which have not been condemned to the payment of any other debt, or included in any other liens or decrees, and pay the same in the discharge of the above amount of (17,250.00) and make report of said collections at the times herein specified.

9th. It is ordered that this cause be retained for further orders.

A. M. PARKER,
Probate Judge of Jackson County, N. C.

(122) And thereafter, to-wit: on the 8th day of April, 1885, the said Commissioner, James W. Terrell, filed a report in the office of the clerk of the Superior Court of Jackson County, North Carolina, which is in words and figures, to-wit:

84 Superior Court.

STATE OF NORTH CAROLINA,
Jackson County:

To the Judge of Probate.

SIR: I beg to submit the following statement of sales made by me of the lands of Wm. H. Thomas, a lunatic, also of cash received by me on sales of lands, collected on notes, and from all other sources, and of disbursements made by me, under an order of your court of May 26th, 1880.

1881 Date of sale.	Purchaser's names.	No. of acres.	County.	Quality of land.	Price sold for.	Cash rec'd.	Rec'd. in note
Oct. 4th	Mrs. T. C. Fisher H. P. Brendle of Swain	10 70	Jackson Swain	Mountain West Bend	40.00 300.00	40.00 75.00	 225.00
" 18	W. J. Allen	200	Jackson	Mountain	200.00	50.00	150.00
	M. Fain part of Brittain tract		Cherokee	Cleared	1000.00	250.00	750.00
	J. D. Buchanan & Wm. Bumgarner		Swain	Mountain	400.00	400.00	
	W. H. Thomas, Jr.	80	Jackson	State survey	80.00	20.00	60.00
1882							
Jan. 12	Qualla Town Store John W. Bird						
	Mountain land	10		60 acres of mountain			
		60					
		70	Jackson	10 70	400.00	400.00	
" 19	John Parris & T. D. Baird	125	"	Mountain	125.00	31.25	93.75
2 19	T. G. Fisher & A. W. Farmer	225	"	"	225.00	56.25	168.75
Feb. 6	John Henry & W. A. Clayton	200	"	"	150.00	37.50	112.50

Date of sale.	Purchaser's names.	No. of acres.	county.	Quality of land.	Price sold for.	Cash rec'd.	Rec'd in note.
Apr. 10	W. H. Reese No. 37 in Dist. 8	140	Cherokee	State Survey	307.00	51.75	155 25
	M. F. Reese No. 39 in Dist. 8		"	"	128.66	32.16	96.50
	Mary Ann E. Reese No. 35 in Dist. 8	83	"	"	94.35	23.60	70.75
	Carried forward				1330.01	632.51	697.50
1882 continued—			Amounts up		1350.01	632.51	697.50
June 17	J. C. & A. W. Axley Bank lot	Acres	Cherokee	town lot	750.00	250.00	500.00
Sept. 20	C. W. & W. A. Clayton	50	Jackson	Mountain	40.00	10.00	30.00
Oct. 27	Hix Monteith, John Thompson & C. C. Reid,	100	"	"	100.00	25.00	75.00
Nov. 22	A. J. Patton, part of Cotothanna tract		Graham	State Survey	150.00	37.50	112.50
	J. D. Buchanan	100	Swain	Mountain	200.00	200.00	
85					2570.01	1155.01	1415.00
1883							
Mar. 16	J. H. Kirkland			State			
" 17	No. 8 Dist. 8	121	Cherokee	Survey	225.00	56.25	168.75
" 17	George R. Eager Nos. 89,-91,-93, 95,-97 in Dist.—	1002	"	"	1002.00	252.00	750.00
Oct. 25	L. J. Slaughter, part of Queen tract		Graham	"	250.00		250.00
Dec. 25	A. J. Robbins tract No. —— Dist. 3	100	Cherokee	"	240.00	60.00	180.00
					1717.00	368.25	1348.75
1884							
	L. F. Fisher	10	Jackson	Mountain	10.00	10.00	
Feb. 14	John Reno No. 19 Dist. 2	112	Clay	State Survey	112.00	28.00	84.00
	Charles Shlagle	150	Macon	"	150.00	37.50	112 50
					272.00	75.50	196 50
1885							
Mar. 21	John N. Macomb	3101½	Jackson	Mountain	3445.50	861.18	2584.32

Recapitulation of sales

Sales of 1881	2020.00	835 00	1185.00
" " 1882	2570.01	1155.01	1415.00
" " 1883	1717.00	368.25	1348.75
" " 1884	272.00	75.50	196 50
" " 1885	3445.50	861.18	2584.32
	10024.51	3294.94	6729.57
Sold trees in 1883	1129.60	1129.60	
" " " 1884	1051.90	1051.90	
	12206.01	5476.44	6729.57

Total amount of notes to be accounted for, $2729.57
Total amount of cash to be accounted for from sales 5476.44

I have collected on notes as follows of notes to Terrell & Johnston.

Nov. 2, 1881	Collected of Robert Bruce on his note for land sold by Terrell & Johnston	123.45
	Collected of James M. Collins	73.65
	" " G. W. Dickey	35.00
Dec. 20, 1880	" " John Cogdill per J. L. Henry	55.00
May 16, 1881	" " John Cogdill per self	52.25
" 24, 1881	" " John Cogdill	175.00
Dec. 29, 1882	" " " "	37.28
Nov. 10, 1881	" " Z. T. Olvey	50.00
Mar. 14, 1883	" " " "	35.00
Nov. 10, 1881	" " J. D. Abbott	10.00
Dec. 6, 1881	" " " "	8.62
Oct. 7, 1882	" " " "	100.00
Nov. 18, 1882	" " Rebecca Cline	40.00
Mar. 16, 1883	" " John L. Styles	10.00
June 5, 1883	" " James Collins	25.00
May 13, 1884	" " J. L. Mingus per R. A. Akin	49.23
86		$879.78

I have collected as follows on land sold by me:

Feb. 16, 1885	of H. P. Brendle of Swain, $35.90, June 19, $50, June 27, $32.10	97.02
	of H. P. Brendle of Swain, Oct. 30, $20, Oct. 31, $16,	36.00
	of W. J. Allen per Judson Allen	67.40
Dec. 21, 1882	" John Parris & T. D. Baird, $22.20, June 16, 1883: $13.65 March 27th; $11.95, June 1st, 1884, $31.00	79.48
June 6, 1884	of John Henry & W. A. Clayton per Wm. Bumgarner	125.45
May 16,	" W. H. Reese	50.00
Apr. 19,	" M. F. Reese—paid the day the note was given	22.75
		477.68
	Amount of collections brought up	477.68
May 16, 1884	of Mary Ann E. Reese	10.00
June 19, "	" Monteith Thompson & Reid, $25.75 March 1st $22.50 17th $12.00 Jan. 20th, 1885, $3.00 Jan. 26th 8.00 Feb. 2nd, $10.25	79.50
Mar. 20, "	of George R. Eager $397.50 less fees $2.20	395.30
" 20, 1885	" " " "	420.00
Dec. 25, 1885,	" A. J. Robbins—same day the note was made	15.00
" 25, "	" A. N. Calvert in land afterwards contracted sale of the land	800.00
Mar. 21, 1885	" John N. Macomb, Jr., $1242.66 less 5% discount	1180.53
Oct. 23, 1883	" I. J. Slaughter—day the note was made and credited on it	45.00
	Total cash collected on Terrell notes to date	3423.01
	" " " " Terrell & Johnson notes	879.78
	" " " " land sales	3294.94
	" " on sale of trees	2181.23
	" cash to be accounted for, $9778.96	$9778.96

I have expended cash as follows:

	Paid taxes in Cherokee for 1880 as per receipts	56.19
	" " " Jackson " " " " "	74.03
	" " " Graham " " " " "	29.80
	" " " Swain " " " " "	30.18
Dec. 13, 1880	Started to Cherokee Bill at Franklin 50c. Pikeage at Nantahala 10	.60
" 14,	Dinner at Monday's 50—16 Bill at Mrs. Walker's 1.00 Pikeage 10	1.60

" 18,	Bill at Henesa's 3.00 shoeing horse 50 paid servant 25 Pikeage 10	3.85
" 20,	Bill at Mrs. Walker's 2.00 21st Bill at Robbinsville 1 50	3.50
" 21,	Dinner at Gunter's 25 22nd Bill at Charleston 1.00	1.25
Apr. 25, 1881	Started to Cherokee Bill at Franklin 1.00 pikeage 10 Dinner at Monday's 50	1.60
" 28,	Bill at Mrs. Walker's 1.00 pikeage 10 May 2nd Bill at Murphy 6.00 pikeage 10	7 20
May 2	Shoeing horse 1.00 3rd, Bill at Mrs. Walker's $1.50 Dinner at Monday's 50 pikeage 10	3.10
		212.90

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	Amount of expenditures brought up	212.90
May 3, 1881	My horse got so lame I had to leave him at Franklin & hire one from Cunningham	2.00
4,	Paid mail boy take Cunningham's horse home and bring mine	.50
June 2	Started to Cherokee Court Bill for horse at Franklin 50 pikeage for buggy 25	.75
	Dinner at Slagles 50 4th bill at Mondays 1.00 dinner at Walkers 50 pike 25	1.75
June 10,	Registering deed 10, probating 20 paid Ben Posey as attorney 13	14.20
" 8,	Paid Ferguson as Attorney 20.00 my bill at Henesas 10.00	30.00
" 11,	" servant 50 pikeage 25, bill at Mrs. Walkers 1 00 Mondays 50, pikeage 25	2.50
	Paid horse bill at Franklin 1.00 & shoeing 25	1.25
	" tax in Jackson given in by W. H. Thomas, Jr.	10.70
18	Started to Graham Court dinner at Charleston 50 Bill at Gunters 50	1.00
25	Paid J. L. Henry's bill at Graham 5 50 my bill 4.00 my bill at Nelsons 50	10.00
26	Bill at Allmans 1.00 dinner at Charleston 50	1.50
28	Went to Swain Court bill at Raby's on 30th	4.50
30	Paid J. L. Henry as Attorney	12.00
Oct. 30	Started to Cherokee Court bill at Franklin 1.00 pike 10 dinner at Mondays 50	1.60
31	Bill at Mrs. Walkers 1.00 pike 10	1.10
Nov. 9	Paid Ben Posey on fees as per receipt	75.00
12	" G. S. Ferguson on fees as per receipt	74.00
12	" R. A. Akin for registering deeds & for copies of deed in King & Cooper suits	3 75
12	My bill at Henesas	16.55
13	Bill at Mrs. Walkers 1.00 pike 10 paid servt 10	1 20
17	" at Phillips 6 00 17 at Mrs. Nelsons 50 18 at Allmans 1 00	7.50
28	Bill at Swain Court	4.00
16	Paid W. A. Enloe judgment in Jackson Superior Court	368.72
23	" Henesas Witness ticket	8.20
23	" J. C. Axley Court costs at Murphy	17.65

88

	Carried forward	884.92
1881	Amount of Expenditures brought up	884.92
	Paid W. A. Dills for surveying at 2 times $5. each time Receipt	10.00
May 31	Paid J. R. Thomas	100.00
Nov. 9	" J. L. Henry on fees	64 00
10	" John Rolen " "	10.00
Apr. 26	" A. M. Parker Clerk fees	15.00
	" taxes for 1881 Cherokee	74.13
	" " " " Graham	31.30
	" " " " Swain	32.25
	" " " " Jackson	73.71
		1295.31

	1882	
May	Started to Clay Court, bill for horse at Franklin	.50
	Paid pikeage 25 bill at Mondays 1.00 Pikeage in Clay 25	1.50
	Bill at McClures 1.50 & for repairing buggy and harness broken on mountain	11.50
	Dinner at Widow Rogers	.50
June 17	Paid Henesa for G. S. Fergusons board	25.00
	" " " W. E. Moores board charged to Ferguson	6.50
	" " " W. B. Fergusons board charged to him	15.00
	" " " my own board	18.75
	" R. A. Akin for copies of deed needed in suits	1.10
	" M. Fain for arranging tax list	40.00
	" J. C. Axley Court cost	12.20
18	" Bill at Mrs. Walkers 2.25 pikeage 25 paid servant 10	2.60
	Paid John Rolens fees in King & Weeks	30.00
	Paid bill at Graham Court 3.00 paid at Barkers 50	3.50
	Dinner at Mrs. Nelsons 50 Bill at Allmans 1.00	1.50
	Bill at Swain Court at Collins	2.50
	Paid for probating deeds in Graham	2.75
80	Carried forward	1470.71
	1882 Amount of Expenditures brought up	1470.71
June 28	Paid Wm. H. Thomas, Jr., in note on himself	79.50
13	" H. P. Brendle Shff. cost in Adams case	9.19
Nov. 16	" A. T. Davidson Attorney fees in case State v. Terrell	25.00
	" John Rolen	5.00
18	" refunded to Wm. King money collected and reported to Federal Court	184.95
19	Paid Axley cost in suits in Cherokee	15.60
20	" Henesa for surveying per order of Court	12.75
20	" " for G. S. Fergusons board, charged to F.	16.50
20	" " " Jas. R. Thomas's board	4.00
20	" " " W. B. Ferguson's board	22.00
20	" " " my own board	13.50
	On margin: These items were paid at different times in 1882 to 1882, and tickets all filed together, which see.	
	Paid T. C. Rogers witness ticket to Clay Court	16.66
	" J. H. Henesa	4.70
	" J. H. Henesa	4.70
	" W. P. Farmer	6.50
	" J. H. Henesa	3.20
	" W. P. Farmer	3.20
	" Saml. Henry	4.70
	" Saml. Henry	4.70
	" M. W. West	6.20
	" R. A. Akin	3.20
	" R. A. Akin	6.20
	" M. Fain	6.20
	" Clerk Sanderson cost	1937.27
	Carried forward	1935.07
	1883 Amount of Expenditures brought up	1936.07
	Paid tax for 1882 in Cherokee	73.00
	" " " " " Graham	32.18
	" " " " " Swain	31.87
	" " " " " Jackson	62.00
	" back taxes in Macon by J. Johnston	6.76
Apr. 12	" Lundsey Bumgarner for carrying a *chane*	1.50
	" for privy examination of Mrs. Wm. Bumgarner for Qualla deed	.31
May 16	Paid T. C. Fisher carrying chain and board of surveyors	2.00
19	" A. N. Cockerman for deed to Conleys Creek tract	1.50
Aug. 7	" Conner for carrying chain	1.00
Dec. 9	" Walter E. Moore as attorney	4.00
	" J. D. Buchanan & Wm. Bumgarner for Qualla Store Place	400.00
90		2552.19

	1883		
Apr.	13	Started to Cherokee bill for horse at Franklin	.50
	14	Pike 10 bill at Mondays 1.00 Mrs. Walkers 1.00 Pike 10 bill at Henesas 1.50	3.60
	19	Bill at Reese's 1.00 bill, 22, at Henesas 3.00 pike 10	4.10
	24	" at Mrs. Walkers 1.00 Dinner at Mondays 50 pike 20 bill at Franklin 50	2.20
May	4	Paid Wm. A. Dills for surveying	22.00
"	16	" K. Elias on Swepson judgment	1995.00
"	18	Started to Clay Court, bill at Charleston 1.00 dinner at Allmans 50	1.50
"	20	Bill at Mrs. Nelsons 1.00 dinner at Valley River 50 Bill at Murphy 1.00	2.50
"	20	Bill at Curtis's in Clay 1.00 26 bill at McClure's Hayesville 4.50	5.50
June	7	Paid J. W. Cooper at Murphy on Adams Judgt.	259.50
	8	" West for copies of deeds	6.50
	11	" Henesa G. S. Ferguson's bill 16.00, W. B. Ferguson's bill 8.75 my own 14.25	39.00
	11	Paid G. S. Ferguson cash 37.50	37.50
			4931.51
	1883	Amount of Expenditures brought up	4931.59
June	13	Bill at Mrs. Walkers 2.00 pikeage 10	2.10
	18	Paid Ben Posey cost in the case Millsape vs. Hilliard	10.00
		" Witness tickets to W. F. Cooper 1.10, G. W. Cooper 2.20, Jason Hyde 1.10, J. J. Colvard 1.20	5.60
		Paid Clerk's cost in same	5.40
		" Bill at Phillips 6.00, Gunters 50, Allmans 1.00, Charleston 25	7.75
	27	Paid W. B. Thompson for registering deeds	3.00
		" my bill at Charleston Court	3 50
July	7	Paid J. R. Thomas 1 receipt 60, & 1 for 50	110.00
Aug.		Spent the month in Swain surveying land and selling and marking trees and on Sept. 10 paid to D. Lester as per account and receipt	100.64
Sep.	10	Paid G. W. Dilliard for dispossessing Will Cline from Brooks place	10.00
		Paid J. W. Codgill Justice's fee in above case	1.00
March	5	" for registering Qualla land papers	4.25
	15	" D. Lester for surveying	2.50
	14	" A. J. Long for copies of deeds	4.50
Aug.	30	" Sundry parties for marking trees in Swain	21.35
Sept.	1	" J. W. Fisher for Court record	2.50
		" J. W. Fisher cost in T. K. Welch case 1.95 also A. W. Parker in same case 6.50	8.45
Sept.	20	Paid K. Elias on Swepson judgment	205.00
Oct.	8	" Sallie Thomas	50.00
"	12	" K. Elias on Swepson Judgment	20.00
"	3	Started to Cherokee, bill at Charleston	1.00
		Bill at Mrs. Nelsons 25 at Mrs. Walkers 1.00	1 25
		Paid J. C. L. Gudger balance in full of Attorneys fees	34.00
		" C. S. Ferguson fees as Attorney	34.00
		" W. B. Ferguson bill at Henesa's	16.50
		" my bill at Henesa's 15.50, also costs by order of Court 17.00	35 50
			5629.38
91		Amount of Expenditures brought up	5629.38
	1883.		
Oct.	21	Bill at Mrs. Walkers 2.25, pike on 19th 10	2.35
	25	Paid costs in Graham, J. G. Tatham 4.30, Sheriff 1.20	5.50
	30	" bill at Graham 9 & for board and surveying 21.00	30.00
	31	" Hamp Kirkland on compromise of suit	5.00
Nov.	7	" bill at Rabys—Swain Court	5.00

	3	" G. S. Ferguson	20.00
		" Dr. Hilliard out of Mauney note	100.00
		" tax in Cherokee for 1883	51.77
		" " " Graham " "	29.00
		Paid tax in Swain for 1883	38.35
		" " " Jackson " "	55 63
		" " " Macon " "	2.43
Dec.	28	" Wm. H. Thomas, Jr.	66.50
May	10	1884 Started to Cherokee Court, Bill at Charleston	1.00
	11	Dinner at Allmans 50 bill at Mrs Walkers 1.00	1.50
	14	Paid Mrs. Hyatt for three days board where I was sick	2.00
	16	" M. C. King on judgment	250.00
	17	" J. W. Cooper	165.00
	18	" Henesa for G. S. Ferguson	39.15
		" " " W. B. Ferguson	16.25
		" " " my bill	11.25
		" Ben Posey fees in full for all the Cherokee cases	305.00
		" Jas. Black for ticket of 3.50—he shaved in 1.50	2.00
		" " " " " at last Court	2.00
	22	" bill at Mrs. Nelsons 1.00, bill at Charleston 1.00	2.00
	24	" Sallie L. Thomas—sent money to Knoxville	50.00
	29	" J. R. Thomas for W. H. Thomas, sen.	30.00
			6918.06
	92	Amount of Expenditures brought up	6918.06
		1884	
Aug.	20	Paid J. E. Reid for costs in Federal Court	20.00
		" Hyde of Graham for surveying	17.00
Oct.	2	Started to Cherokee Court, bill at Charleston 50 at Allmans 50	1.00
	4	Bill at Mrs. Walkers	1.00
	16	Paid G. S. Ferguson on fees	40.00
		" Henesa on G. S. Ferguson Board	23.50
		" " " W. B. Fergusons Board	14.00
		" " " my own bill	13.50
	17	" Bill at Mrs. Walkers 1.00 Dinner at Phillips 50	1.50
		" " " Shopes 2.50 at Crisps 25, at Welch's 75	3.50
		" " " Charleston	1 00
	17	" Jas. R. Thomas	50.00
	20	" Sallie L. Thomas	100.00
		" Wm. Sherrill as chain bearer	1.00
		" in fee in summons in Noah Ashe case	.60
	3	" in Mrs Lou Bryson's judgment	287.33
Dec.	2	" K. Elias on Swepson judgment	100.00
	10	Started to Cherokee, bill at Charleston 1.00 Allman's 50	1.50
	12	Paid bill at Mrs. Walkers 1.00, 15 bill at Henesas 5.00	6.00
	16	Bill at Mrs. Walkers for self and M. L. Brittain	2.00
		M. L. Brittains bill at Maunies 50, Rymers 2.00, Lesters 75,	3.25
	22	Paid M L. Brittain for six days service showing old lines	12.00
		" D. Lester for board & surveying	41.31
		" Hyde for surveying 20.00; paid Rymer for Hyde's board 2.00	22.00
	30	Paid J. G. Tatham cost in Sherrill vs. Ghormley	114.25
		" for probating and registering deeds in Graham	6.50
			7801.80
		Amount of Expenditures brought up	7801.80
		1884.	
Dec.	30	Paid Thos. Lester on land compromise, arbitrated	82.00
		" James Rymer " " " "	93.55
		" Jacob Shope for work and board	5.00
		" Bill at Phillips 3.00, bill at Gunters 50	3.50
		" " " Charleston	1.00
		" taxes for 1884 in Jackson	34.00
		" " " " " Swain	42.22

	1885.		
Jan.		Paid J. W. Cooper on Adams judgment	25.00
		" K. Elias on Swepson judgment	20.00
		" K. Elias " " "	133.00
Mar.	8	Started to Asheville Hack fare to RR 50, ticket to Asheville 2.10, dinner at Balsam 50, board at Grand Central 6 00, hack 25	9.35
	14	Railroad ticket home 2.10, dinner 50	2.60
	17	Went back—hack fare 50, ticket to Asheville 2.10, hack 25	2.85
	24	Bill at Grand Central	7.00
		Paid for stationery for bond plots &c	.45
	25	" Jas. P. Sawyer W. H. Thomas account	72.20
		" Dr. Hilliard as Guardian	100.00
	26	Went to Franklin, paid K. Elias on Swepson judgment	500.00
		Paid Clerk of Macon execution cost 2.25, bill at Cunninghams 1 50	3.75
		Paid David Turpin for board of Surveyors	6.25
		" Cotts chainbearer 1.75 Rufus Moore chainbearer 2.25	4.00
93			9129.52
		RECAPITULATION.	
		Whole amount of cash from all sources	9778.99
Apr.	8, 1885	Total cash expended to date	9129.52
		Carried forward	649.44
Apr.	8, '85.	Leaving to be accounted for the sum of six hundred and forty-nine dollars 44 cents	649.44

Respectfully Submitted,

JAS. W. TERRELL,
Commissioner.

Webster, N. C., April 8th, 1885.

Sworn to and subscribed before me April 8th, 1885, reserving the privilege to correct errors.

J. W. FISHER, *C. S. C.*

Supplement to Report of April 8th, 1885.

The following items were omitted by mistake:

Nov.	18, '83	Received of M. Fain on his note $375. & interest 21.50	396.50
"	18, '84	Received of M. Fain on his note $375. & interest 43.00	418.00
			814.50
			$1463.94
"	28, 1858	Wm. H. Thomas gave his note for $600. Nov. 28th, 1858, to J. W. Gibbs for land sold to Mrs. Sarah Keener, on which I paid as follows:	
		Paid H. A. Boon for legal services	5 00
		To interest on same from Spring Term, 1858	7.80
		Paid Allen Fisher two judgments, 1 for 6.45 & 1 for 3.20	9.65
		Interest on same to this date	15.05
		Judgment to T. K. Welch $1947 & interest to this date 30.37	49.84
Jan.	1, 1867.	There was then due after payments the sum of	292.67
		Interest to April 1st, 1885	700.47
			700.48
			763.46

Respectfully submitted,

JAS. W. TERRELL,
Commissioner.

NORTH CAROLINA,
Jackson County:

Sworn and subscribed to before me this April 1st, 1885.
And all sales confirmed in said report.

J. W. FISHER,
Clerk Superior Court

94 That afterwards, to-wit: on the 25th day of October, 1889, James R. Thomas filed in the office of the Clerk of the Superior Court of Jackson County, North Carolina, an application for letters of guardianship of the estate of William H. Thomas, lunatic, which application is in words and figures as follows, to-wit:

STATE OF NORTH CAROLINA,
Jackson County:

In the Superior Court.

In the Matter of the Estate of WM. H. THOMAS, Lunatic.

Application for Letters of Guardianship.

To the Honorable the Superior Court of Jackson County:

The undersigned would respectfully represent and make known to your Honorable Court that: W. H. Thomas is a lunatic now confined in the asylum for the insane in North Carolina, at Morgantown, N. C.

That said lunatic is without guardian.

That said lunatic's estate, so far as the undersigned can ascertain, consists of real estate in the counties of Haywood, Jackson, Swain, Graham, Cherokee, Clay and Macon Counties, North Carolina, and of real estate in the State of Georgia, but the number of acres and value of such real estate, the undersigned cannot give a definite idea.

Also the undersigned is informed that there is due said lunatic notes for lands heretofore sold, but the amount and value can not be stated.

The undersigned is a son of said lunatic, and is willing to and now makes his application to become guardian of the said lunatic's estate.

He further represents that the immediate appointment of a guardian is necessary for the well managing and safety of said lunatic's estate.

The children of said lunatic are W. H. Thomas, Jr., Sallie L. Avery and the undersigned, and said W. H. Thomas, Jr., and Sallie L. Avery have requested the undersigned to become guardian of said estate.

JAS. R. THOMAS.

Sworn and subscribed to before me this 25th day of October, 1889.

J. H. FISHER,
Clerk Superior Court.

95 On the reverse of the foregoing application appears the following: In the Matter of the estate of W. H. Thomas, lunatic, Application of J. R. Thomas for letters of guardianship. Whereupon the following Letters of Guardianship were issued:

Letters of Guardianship.

STATE OF NORTH CAROLINA,
Jackson County:

In the Superior Court.

To all whom these presents shall come, Greeting:

It being certified to the undersigned, Clerk of the Superior Court for the County of Jackson that W. L. Hilliard, guardian of W. H. Thomas, lunatic, has resigned said guardianship, and it appearing that said W. H. Thomas, lunatic is now insane and without guardian, and James R. Thomas having applied for the guardianship said lunatic and having been duly qualified as such:

Now these are therefore to authorize and empower the said guardian to enter in and upon all and singular the goods, and chattels, rights and credits of said lunatic, wheresoever to be found, and the same to take into possession secure and improve, and further to manage said estate and every part thereof for the benefit and advantage of said lunatic, and according to law.

Witness my hand and the seal of said court, this the 25th day of October, 1889.

J. H. FISHER, *C. S. C.*

And thereupon the said James R. Thomas, guardian, subscribed and filed the following oath:

STATE OF NORTH CAROLINA,
Jackson County, ss:

In the Superior Court.

I, J. R. Thomas, Guardian for W. H. Thomas, lunatic, solemnly swear that I will well, and truly take charge of and preserve all the estate of my said ward, and that I will make true returns, and annual settlements as long as any of the estate remains in my hands, and that I will renew my bond every three years in the Superior Court as the law requires, and all other duties of my said guardianship I will faithfully and honestly perform with the best of my skill and ability, so help me God.

JAS. R. THOMAS, *Guardian.*

96 Sworn to and subscribed before me 25 day of October, 1889.

J. W. FISHER,
Clerk Superior Court.

And there-fore, to-wit: on the 25th day of October, 1889, the said Jas. R. Thomas, guardian, filed in the office of the Clerk of the Superior Court of Jackson County a petition and application to sell real estate of his said ward in the words and figures following, to-wit:

JACKSON COUNTY:

In the Superior Court.

In the Matter of W. H. THOMAS, Lunatic.

James R. Thomas, Guardian of W. H. Thomas, Lunatic, would respectfully show to the Court:

1. That heretofore W. L. Hilliard has been guardian of W. H. Thomas, lunatic, and has resigned and your petitioner has been duly appointed and has duly qualified as guardian of W. H. Thomas, lunatic, and his estate.

2. That from the best information that your petitioner has of the condition of the estate of W. H. Thomas, lunatic, the same is indebted from eight to twelve thousand dollars, and there are not sufficient of personal property to pay said indebtedness.

3. That the estate of said W. H. Thomas, lunatic, consists of real estate, lands in the Counties of Haywood, Jackson, Macon, Clay, Cherokee, Graham and Swain in the State of North Carolina, and as your petitioner is informed, said lunatic has real estate in the State of Georgia, the particulars of which your petitioner is unable to state.

4. That the lands in the State of North Carolina consist of an interest in a large speculation, known as the Love Speculation, of other large boundaries of timber and grazing lands, unimproved, of various small tracts of unimproved land suitable for farming, of mineral interests in various tracts of land, of some town lots, and of some improved farms.

5. That in order to meet the indebtedness of the estate of the said W. H. Thomas, lunatic, and the costs of administering said estate, it is necessary to sell a large portion of the real estate of said lunatic, and the wide extent of country over which
97 the same is scattered, it is not practicable, nor for the best interest of the estate to be sold by public sale, as the same can be sold by private sale to a greater advantage, and for a better price.

Wherefore, your petitioner prays the court to grant your petitioner leave and the power to sell at private sale, as guardian of W. H. Thomas, lunatic, so much of the real estate, lands, of said W. H. Thomas, lunatic, as may be necessary to pay off and discharge the indebtedness of the estate of said lunatic, and the costs and expenses attending the same, and as in duty your petitioner prays, &c.

W. B. FERGUSON &
G. S. FERGUSON,
Attorneys for Estate of W. H. Thomas, Lunatic.

Jas. R. Thomas, guardian of W. H. Thomas, lunatic, being duly sworn says: that he has read the foregoing petition in the matter of W. H. Thomas, lunatic, and the facts therein stated of his own knowledge are true, and those facts stated on information he believes to be true.

JAS. R. THOMAS.

Sworn and subscribed to before me this 25th day of Oct., 1889.

J. W. FISHER,
Clerk Superior Court.

On the reverse side of the foregoing petition appears the following: In the Matter of the Estate of W. H. Thomas, Lunatic. Application of J. R. Thomas, Guardian, to sell real estate.

And upon the filing of said petition the following order was made in words and figures as follows:

STATE OF NORTH CAROLINA,
Jackson County:

In the Superior Court.

In the Matter of W. H. THOMAS, Lunatic.

Superior Court, Clerk's Office, 25th Oct., 1889.

The above matter coming on to be heard and being heard upon the petition of Jas. R. Thomas, guardian of said W. H. Thomas, signed by counsel, W. B. Ferguson and G. S. Ferguson, and
98 being verified by the oath of the said J. R. Thomas, and it appearing from said petition that said estate is indebted, and it being made likewise to appear that a sale of a portion of the land belonging to said lunatic is necessary for the payment of the indebtedness thereof and costs of administrating the same.

It is therefore ordered, adjudged and decreed that said James R. Thomas, guardian, as aforesaid, be authorized, empowered and licensed to sell such and so much of said lunatic's estate as shall be necessary for the payment of the indebtedness thereof, and costs of managing said estate.

And it further being made to appear to the court that from the character and nature of said real estate, that the best interests of said estate will be subserved by private sale instead of public sale, it is further ordered, adjudged and decreed that said Jas. R. Thomas have leave to make sale of said lands at private sale, and that he be not required to make sale thereof at public sale.

It is further ordered that he make report of such sales as he shall make to this court as he is in all other things pertaining to his said guardianship, required to do by law.

J. W. FISHER, *C. S. C.*

On the reverse side of the foregoing order appears the following: In the Matter of the estate of W. H. Thomas, Lunatic, Order to sell real estate.

That afterwards, to-wit, on the 9th day of Jan., 1899, a petition was filed in the matter of W. H. Thomas, Lunatic, by James R. Thomas and others before Felix Alley, Clerk of the Superior Court, and proceedings were thereon had, which petition and proceedings are in words and figures following, to-wit:

STATE OF NORTH CAROLINA,
Jackson County:

In the Superior Court.

In the Matter of W. H. THOMAS, a Lunatic.

The petition of James R. Thomas, A. C. Avery and wife, Sallie L. Avery, James R. Thomas, administrator of W. H. Thomas, Sr., deceased, and Sallie Thomas, William Thomas, Love Thomas, De Witt Thomas, Bryan Thomas and Mary Thomas, infant children and heirs at law of W. H. Thomas, Jr., deceased, by their guardian, James R. Thomas, respectfully showeth:

99 1.

That on the 14th day of May, 1880, W. L. Hilliard, Guardian of W. H. Thomas, Sr., then a lunatic, filed a petition before the Clerk (then Judge of Probate) of the Superior Court of Jackson County and upon said petition of said guardian, it was ordered and adjudged that James W. Terrell be appointed a commissioner and as such commissioner should be authorized and empowered to sell and convey upon the terms therein set forth all of the lands belonging to the said W. H. Thomas, Sr., a lunatic, and upon confirmation of such sales to make title to the purchasers.

2.

That the said Terrell, as your petitioners are informed and believe, acting under the authority conferred upon him by said judgment proceeded to sell from time to time a large number of tracts of land, for which he collected a large sum of money, as purchase money, and that under said order he was required to report said sales annually to the court for confirmation and to return also annually an account of his disbursements of the funds arising from such sales.

3.

That as petitioners are informed and believe, the said James W. Terrell, continued to make sales of various tracts of land, belonging to said W. H. Thomas, Sr., until the 25th day of October, 1889, when your petitioner, James R. Thomas, was duly appointed and qualified of the said W. H. Thomas, Sr., in the place of W. L.

Hilliard, who had resigned and was by an order of the Superior Court of said County of Jackson, upon petition, substituted for said James W. Terrell, commissioner as aforesaid, and clothed with the power and authority theretofore exercised, under the former order of said court, by the said James W. Terrell, to sell at public or private sale any of the land belonging to his said ward, W. H. Thomas, Sr.

4.

That as your petitioners are advised, informed and believe, the petition of James R. Thomas, guardian of W. H. Thomas, Sr., and the order predicated thereon empowering your petitioner, James R. Thomas, as guardian and commissioner, to sell the lands of his said ward, as aforesaid in place of James W. Terrell, was by inadvertence entitled "In the matter of the estate of W. H. Thomas, lunatic." Whereas it was intended to be a part of the said original proceeding, entitled "In the matter of W. H. Thomas, lunatic," and that by inadvertence the Clerk of the Superior Court of Jackson County has kept in separate files the aforesaid petitions of W. L. Hilliard, guardian, and James R. Thomas, Guardian, as well as the orders made in pursuance of each of said petitions by the court.

5.

That the said William H. Thomas, Sr., died in the Western Hospital for the insane at Morganton on the — day of May, 1893, and your petitioner, James R. Thomas, was duly appointed and qualified as his administrator on the 30th day of June, 1893.

6.

That the said W. H. Thomas, Jr., son and heir at law of said W. H. Thomas, Sr., died on the — day of May, 1897, and your infant petitioners, Sallie Thomas, William Thomas, Love Thomas, De Witt Thomas, Bryan Thomas and Maria Thomas, the only heirs at law of the said W. H. Thomas, Jr., and are represented and appear by their duly appointed and qualified guardian, James R. Thomas.

7.

That the said James W. Terrell filed on September 12th, 1896, in said proceeding a report of sales, of cash collected and disbursements theretofore made by him while acting as commissioner, under said order, but said account has never been examined and approved by the court, and no order has been made in reference thereto.

Your petitioners are advised that said report was not made in accordance with the order, requiring annual reports and returns, but after the lapse of sixteen years from the time when said Terrell began to act as commissioner, and your petitioners are further advised that it is due to them and to the interest especially of your infant petitioners that the said report should be scrutinized, lest after the lapse of so many years omissions may have been made and other mistakes might be discovered upon critical examination of said report.

8.

That your petitioners are advised, informed and believe that it is necessary when sales have been made in good faith by said Terrell and have not been confirmed to give authority to your petitioner, James R. Thomas, to make title to purchasers upon payment of the purchase money.

101

9.

That your petitioner, James R. Thomas, has sold a number of tracts of land and has disbursed the proceeds of such sales in payment of the indebtedness of the estate of the said W. H. Thomas, Sr., and no allowance has ever been made the said Thomas as commissioner or guardian for such services.

10.

That your petitioner, James R. Thomas, administrator of W. H. Thomas, Sr., has paid to said James W. Terrell a large sum of money for his services as commissioner under said order though the account of said Terrell, filed as aforesaid has never been approved nor has any allowance been made by the court for said services.

11.

That petitioners are advised, informed and believe that said Terrell while acting as commissioner as aforesaid sold a large amount of timber cut from the land of said W. H. Thomas, Sr., and is accountable for the value thereof, and negligently caused the loss and destruction of much valuable timber, for the value of which he is accountable on settlement with the estate of said Thomas, as for money had and received for the use, and that timber of the value of at least six thousand dollars was used or destroyed by said Terrell or his agents or removed or lost by his license- and your petitioners pray that the loss to said estate growing out of said agency may be considered in taking an account of his receipts and disbursements and the allowance of his fee.

12.

That it appears from the orders made in the said proceedings about the — day of ——, 1880, that the said Terrell was ordered and directed to pay over a large sum therein mentioned, over two thousand dollars out of any money coming into his hands as commissioner for the maintenance and education of petitioners, James R. Thomas, and Sallie L. Thomas (now Sallie L. Avery) who were then infants, but that the said Terrell failed and neglected to pay money coming into his hands applicable in law to said purpose but applied the whole amount received to other purposes, including the payment of attorney's fees and his own fees in anticipation of an order of the court making an allowance. The said petition-
102 ers ask that said Terrell be held to an account for all the sums so allowed and misapplied by him.

Wherefore your petitioner prays:

1st. That the two proceedings entitled respectively as aforesaid "In the matter of the estate of W. H. Thomas, lunatic," and "In the matter of W. H. Thomas, Lunatic," be consolidated and that this petition be treated as a supplemental petition in said proceeding so consolidated and that the petitioners be made parties plaintiff.

2nd. That the account of sales, receipts and disbursements and liabilities of the said Terrell, as commissioner and the account of your petitioner, James R. Thomas, of sales of said land, of the disbursements of the proceeds of such sales by him as guardian of said Thomas and commissioner be referred to a competent accountant to examine and report to the court, after notice to the parties interested.

A. C. AVERY,
Attorney for Petitioners.

James R. Thomas being duly sworn, maketh oath before me that the facts stated in the foregoing petition as of his own knowledge are true and those stated on information and belief he believes to be true.

JAMES R. THOMAS.

Sworn to and subscribed before me this the 31st day of Dec., 1898.

[SEAL OF COURT.] N. P. WALKER, *C. S. C.*,
By T. W. WILLIS, *D. C.*

NORTH CAROLINA,
Jackson County:

In the Superior Court.

Before Felix E. Alley, Clerk.

In the Matter of WILLIAM H. THOMAS, Lunatic.

Upon the hearing of the petition of James R. Thomas, A. C. Avery and wife, Sallie L. Avery, James R. Thomas, administrator of William H. Thomas, Jr., *James R. Thomas, administrator of William H. Thomas, Jr.*, and Sallie Thomas, William Thomas,
103 Love Thomas, De Witt Thomas, Bryan Thomas and May (alias Mariah) Thomas, infant children and heirs at law of said W. H. Thomas, Jr., by their general guardian, James R. Thomas, and upon reading the accompanying affidavit, it is, upon motion of A. C. Avery, attorney for petitioners, ordered, adjudged and decreed that the proceedings heretofore filed entitled "In the Matter of the Estate of W. H. Thomas, Lunatic," but intended to be entitled "In the Matter of W. H. Thomas, Lunatic," be hereby consolidated with said proceeding entitled "In the Matter of W. H. Thomas, Lunatic," instituted by petition of W. H. Hilliard, Guardian, on May 14th, 1880, before the then Probate Judge of Jackson County, and that all orders heretofore made in pursuance of the

petition of James R. Thomas, entitled by mistake "In the matter of the Estate of W. H. Thomas," be deemed to have been made and treated as made in the cause or special proceeding instituted as aforesaid by W. L. Hilliard, Guardian, on the 14th day of May, 1880.

It is further ordered and adjudged that the report of a sales herewith filed by James R. Thomas, made by him as Guardian of W. H. Thomas, or since the death of W. H. Thomas, Sr., and all such sales heretofore reported by him be in all things confirmed reference being hereby made to the reports of sale filed by said Jas. R. Thomas for a description of the lands, and the sales of which are intended to be confirmed, and it appearing that W. H. Thomas, Sr., and W. H. Thomas, Jr., have both died since the original petitions were filed, the first by W. L. Hilliard, Guardian, and the second subsequently by James R. Thomas, Guardian of W. H. Thomas, Sr., it is further ordered that the petition of James R. Thomas, administrator of the said W. H. Thomas, Sr. be empowered as such administrator, and as a Commissioner appointed by the court, upon the payment of the purchase money for any lands heretofore sold by said Thomas, purporting to act in pursuance to an order made by the Clerk of the Superior Court of the County of Jackson, N. C., to make title to the purchaser or purchasers of any such lands heretofore sold and heretofore or herewith reported for confirmation of sales, and also to make title where he, said James R. Thomas, has heretofore collected the purchase money and agreed to make title to any lands sold by James W. Terrell as commissioner, before the qualification of said James R. Thomas.as guardian of W. H. Thomas, Sr., and before he was authorized and empowered by an order in the above entitled proceedings to sell, either at public or private sale, any of the lands of the said W. H. Thomas, Sr., then a Lunatic.

It is further ordered that all sales of the lands of W. H. Thomas, Sr., heretofore made and reported by the petitioner, James R. Thomas, whether before or since the death of W. H. Thomas, Sr., or herewith reported, are hereby and in all things confirmed,
104 and said Jas. R. Thomas is authorized as administrator and commissioner, as aforesaid, to make title to the purchaser upon payment of the purchase money in case of any such sales.

This July 6th, A. D., 1899.

FELIX E. AXLEY, *Clerk,*
Clerk Superior Court.

The foregoing order of the clerk is approved and in all things confirmed.

FRED. MOORE, *Judge, &c.*

On the reverse of this order appears the following:

Copy of order in the Matter of W. H. Thomas, Lunatic, Order July 6th, 1899. Approved by the Judge of the 12th Judicial District. Filed September 8th, 1899.

FELIX E. AXLEY, *Clerk.*

STATE OF NORTH CAROLINA,
Jackson County:

In the Matter of WM. H. THOMAS, Lunatic.

It is agreed by the undersigned counsel for the parties to this cause and for J. W. Terrell, respondent, that the counsel for J. W. Terrell shall furnish a copy of their answer to the petition herein filed by Jas. R. Thomas et al. to their counsel, R. D. Gilmer and A. C. Avery, on or before September 8th, 1899, and that said R. D. Gilmer and A. C. Avery are to be allowed till the 30th day of September, 1899, in which to file answer or reply and to furnish a copy of their answer or reply to the undersigned counsel for said Terrell, and that they shall have two weeks thereafter in which to file rejoinder, a copy of which, if they file any, shall be furnished said counsel for petitioners.

It is further agreed that this special proceeding, entitled as above, shall be entered upon the docket of the Superior Court of Jackson County at the fall term, 1899, thereof, to be then further proceeded with according to law, and for all purposes.

It is further agreed that any motion which counsel for any of the parties or for said J. W. Terrell may desire to make in this cause shall be heard at Chambers at Murphy, Cherokee County, on Oct. 24th, 1899, before the judge then holding court in said County of Cherokee, and that such motions shall then and there be heard by such judge as of the fall term, 1899, of the Superior Court of Jackson County.

105 And that the Clerk of this Court shall make his order transferring this cause to the Superior Court at the term time accordingly.

This the 8th day of September, 1899.

R. D. GILMER,
A. C. AVERY,
Counsel for James R. Thomas and Others as Named in the Petition.
HENRY G. ROBERTSON,
C. C. COWAN,
T. H. COBB,
Counsel for Jas. W. Terrell, the Respondent.

NORTH CAROLINA,
Jackson County:

In the Superior Court.

In re WILLIAM H. THOMAS, Lunatic.

This cause coming on to be heard before me, Felix E. Alley, Clerk of the Superior Court of Jackson County, after due notice to the parties in interest, and upon the petition and answer of the respondent, and it being agreed by and between the counsel for the

petitioner and the respondent that this cause be transmitted to the Superior Court of Jackson County, and that all orders, acts and proceedings necessary to a final determination of said cause be had in said court, and that said cause be placed on the Trial Docket for Fall Term, 1899, for all purposes, and said agreement together with all the papers in said case are herewith transmitted and constitute the record in said cause and are asked to be taken as a part of my statement of the case.

This the 8th day of September, 1899.

FELIX E. ALLEY,
Clerk of the Superior Court.

NORTH CAROLINA,
Jackson County:

In the Superior Court.

In the Matter of W. H. THOMAS, Lunatic.

This cause coming on to be heard, and being heard at chambers at Murphy on the 24th day of October, 1899, by consent of parties as of fall term, 1899, of the Superior Court of Jackson County, as per written agreement of parties, filed in this cause.

106 It is now on notice of A. C. Avery and R. D. Gilmer, attorneys for petitioners, constituted, adjudged and decreed by the court that the order of the clerk of the Superior Court of Jackson County purporting to have been made in the above entitled cause on the 3rd day of October, 1896, and to make an allowance to James W. Terrell for services as Commissioner appointed in said cause to sell land, be vacated and annulled for want of jurisdiction of the persons of the petitioners who have since the making of said order become parties to this proceeding.

And on motion of T. H. Cobb and Henry G. Robinson, attorneys for James W. Terrell, it is considered, ordered and adjudged by the court (the counsel for petitioners objecting, as will more fully appear hereafter) that M. W. Bell be appointed referee and be authorized and directed to report upon all issues and questions of fact and law raised by the pleadings in this cause, and especially to take and state an account of the sales of land of W. H. Thomas, Sr., made by the said James W. Terrell by virtue of the authority vested in him by the order in the above entitled cause constituting him Commissioner and of the receipts and disbursements of the purchase money received from the purchaser of any such land or which in the exercise of ordinary care and diligence and good faith on the part of said Terrell ought to have been received, collected and accounted for by him in said capacity as commissioner, and to report further whether any of the lands belonging to the estate of said Thomas were by culpable negligence on the part of said Terrell or through fraud on his part, sold for less than the market value, and what loss, if any, ensued to the estate of the said Thomas in consequence of such fraud or neglect, and to report generally, any loss sustained by the said J. W. Terrell while acting under color of the authority vested

in said Terrell by the order made in the above entitled case, and further, what services have been rendered by said Terrell, and whether he is entitled to any allowance, and if so, to what amount, and what expenses said Terrell has incurred in the discharge of his duties under said order, and what amount, if any, has been paid said Terrell on account of expenses and services, and that the said referee shall report his findings of fact and conclusions of law, together with the evidence taken by him, to the next term of the Superior Court of Jackson County.

ALBERT L. COBLE,
Judge Presiding.

Counsel for petitioners object to the foregoing order of reference, demanding a jury trial, and submitting the grounds of objection as set forth in a paper hereto attached, and marked exhibit
107 "A," and which will be entered upon the minutes of the Fall Term, 1899, of the Superior Court of Jackson County, together with this memorandum of exception, and the foregoing order excepted to.

ALBERT L. COBLE,
Presiding Judge.

EXHIBIT A.

NORTH CAROLINA,
Jackson County:

Superior Court.

Before Coble, Judge, at Chambers, at Murphy, Oct. 24th, 1899.

In the Matter of W. H. THOMAS, Lunatic.

The petitioners, James A. Thomas and others, named in the petition filed herein on the 31st day of December, 1898, through their counsel, A. C. Avery and R. D. Gilmer, object to the order of reference and insist that the issues of fact raised by the pleadings, to-wit, the question,

1st. Whether James W. Terrell has wrongfully appropriated to his own use any of the funds that came into his hands as commissioner, a sum greater than the amount claimed by him as commissions or allowances, and

2nd. Whether said Terrell has negligently wasted, destroyed and lost property, or negligently caused the loss of property rights of W. H. Thomas, while acting under color of his appointment as commissioner, of greater value than the sum claimed by said Terrell as commission or allowances for services amounted to pleas in bar which ought to be settled by a jury before the taking of an account is ordered.

The said petitioners further demand a jury trial of the question above stated, and also upon the question generally, whether any sum of money is justly and lawfully due and owing to said J. W. Terrell

over and above what has already been paid to him for services as such commissioner, or whether said Terrell has been paid in full.

A. C. AVERY,
R. D. GILMER,
Attorneys for Petitioners.

108 STATE OF NORTH CAROLINA,
Jackson County:

Superior Court.

In the Matter of WILLIAM H. THOMAS, Lunatic.

This cause having been referred to me the undersigned M. W. Bell, Referee, and later by all the parties interested, the undersigned Thomas A. Jones having been associated with the said M. W. Bell, the hearing of the same being had at the same time as the hearing of certain matters between the same parties and the heirs of William Johnston in two suits pending in the United States Circuit Court, except as to one hearing had by said Bell separately on the 8th day of January, 1900, in the town of Webster, the said referees beg leave to report as follows: we send herewith the evidence submitted:

We find the following facts:

1. That William L. Hilliard was appointed guardian of William H. Thomas on the 5th day of April, 1878, and that William H. Thomas was adjudged a lunatic on the 15th day of May, 1877; that on the 17th day of May, 1880, the said W. L. Hilliard, guardian, filed his petition in the Probate Court of Jackson County under chapter 57 of Battle's Revisal, the same being filed by said guardian ex parte: we find that the facts as set out in said petition were as found by A. M. Parker, Probate Judge, by his order dated May 26, 1880, with the lands owned by said lunatic, the amount of notes held by him, and the approximate statement of debts as made, and as shown by the three exhibits attached to said petition and the order made by said Probate Judge.

2. We find that James W. Terrell was appointed commissioner by the said Judge of Probate on the said 26th day of May, 1880, and set about in the discharge of the duties incumbent on him as prescribed in said order made by the said Judge of Probate, and that he had the rights and duties set forth therein and was entitled to compensation and emoluments as such commissioner.

3. We find as facts that at the time the said James W. Terrell took charge of the affairs of the estate of said lunatic, they were greatly confused and embarrassed, the lands composing the same were scattered throughout Western North Carolina in the Counties of Jackson, Macon, Swain, Cherokee, Clay and Graham, affected by liens of various judgments in a large sum, and that there
109 were debts outstanding other than the Johnston judgments for an amount approximating nine thousand ($9,000.00) dollars.

4. We find that J. W. Terrell from time to time made the reports

of the various sales by him made as embraced and included in the exhibits numbered one to forty-one, both inclusive, and that all of said exhibits as one document introduced as Exhibit No. 42 are the reports filed by said Terrell in the special proceeding begun before the said Judge of Probate; that said reports were filed in the office of the Clerk of the Superior Court of Jackson County as well as before the Judge of Probate at various times, and that the same were of record on the first Monday in December, 1898.

We find further that the same were not kept continuously in the office, but were permitted to be taken out for various purposes in connection with the matters coming up in regard to the affairs of this proceeding, but that later the same were returned to the office of the said clerk by the sheriff of Jackson County, having been delivered to said sheriff by James W. Terrell, and that they were mislaid by said Terrell for a time and afterwards found by him in the pocket of an overcoat of his. We find that such mislaying was unintentional and has not been productive of wrong or injury in these affairs.

5. We find as facts that the total sales of lands of the estate of William H. Thomas, lunatic, made by J. W. Terrell were the sum of twenty-two thousand three hundred and eighty-two and fifty-one one-hundredths ($22,482.51) dollars, of which a sale of the Britton tract in Cherokee County one thousand ($1,000.00) dollars was cancelled upon the bid having been raised, and that the sale of twelve hundred ($1,200.00) dollars of the six acre lot in Murphy was likewise cancelled, the bid being raised, which two items should be deducted from the said total, and thus the net amount of said sales is twenty thousand three hundred eighty-two and fifty-one one-hundredths ($20,382.51) dollars, except that the sum of two hundred and five ($205.00) dollars of said amount was for notes collected, being embraced by said commissioner in one of his reports as a sale and that the lands actually sold by said Terrell amounted to twenty thousand one hundred and seventy-seven and fifty-one one-hundredths ($20,177.51) dollars.

We find further that said Terrell collected all of the purchase money notes to the same, except the sum of five hundred seventeen and eighty-two one hundredths ($517.82) dollars, and also collected interest on the same to the amount of eleven hundred and seventy-nine and twenty-one-hundredths ($1,179.20) dollars (not including said two hundred and five ($205.00) dollars) and that his disbursements were as follows:

Disbursements to April 8th, 1885	$9,129.52
" " " 21st	1,463.94
" " " 5, 1888	9,384.30
By amt. paid on Thomas judgment	85.92
By amt. to Dec. 31, 1888	396.49
By amt. to June 30, 1889	508 88
By amt. to Sept. 26, 1889	98.21
By amt. to Jany. 1, 1889	1,648.00
Making the total of	$22,715.26

We find that said Terrell received as Commissioner or paid to himself as Commissioner, the following amounts: note of J. N. McComb, of $1,292.32, and also seven notes amounting to $1,260.82, and that he retained as cash the sum of $495.68, and that the notes uncollected were $517.82, and that he also collected of old notes of W. H. Thomas the amount of $832.70, which were not included in the aforesaid sale of lands.

We find as a fact that the note of John N. McComb, Jr., $1,292.32, was to be reduced by one-half the amount of the shortage of the acreage of the land sold to him, which amounted to $496.64, leaving the net amount received by said Terrell on this item as $1,044.00.

6. We find as facts that said J. W. Terrell received as Commissioner sundry certificates for work on turnpike roads built by the State of North Carolina, which were receivable in payment for lands when he qualified as such Commissioner, which, at the date the Code went into effect were not brought forward in the law, and became inoperative and uncollectible for a time; and that on or about the 8th day of January, 1889, he made a contract with one A. J. Long, by which said Long was to receive one-third of the value of the said certificates in consideration of his having an Act passed by the General Assembly of North Carolina, reviving said road certificates, and that subsequently the amount said Long was to receive thereof was increased to fifty per cent.; we find that the same were revived by the General Assembly, and that the said Long has received half thereof; that the amount of the same is thirteen hundred eighty-seven and eight one-hundredths ($1,387.08) dollars, with two-thirds of which the said Terrell is chargeable; we find that one-third of the same was fair value for the services rendered by Long in this behalf, and Terrell had a right to contract to pay Long one-third thereof.

111 7. We find as a fact that in addition to the sale of land, the said J. W. Terrell as Commissioner, was compelled to and did discharge many other duties to the estate of William H. Thomas, among others, the location of many of the tracts of land in various counties, the surveying of the same, the bringing of suits against adverse claimants, the conduct and management of many suits, litigating titles, attendance upon courts, preparation of cases for trial, looking up witnesses, consultation with attorneys and employment of the same, valuing the lands and listing the same for taxation and paying the taxes, and various other things incident to the management of an estate so large as this, and whose affairs were so much involved and so complicated, in all of which we find that he demeaned himself with reasonable prudence and care, save in the matter of the land certificates aforesaid, and that he is entitled to greater compensation than is ordinarily paid to commissioners or executors and similar officers. We find that his services all told are reasonably worth the sum of six thousand ($6,000.00) dollars.

8. We find as a fact that James R. Thomas qualified as Guardian of William H. Thomas on the 25th day of October, 1889, in the Superior Court of Jackson County, the said W. L. Hilliard having resigned as Guardian, and that for some time thereafter, said Terrell continued to sell the lands of the estate, to-wit, in the sum of fourteen

hundred and thirty-two and fifty-one one-hundredths ($1,432.51) dollars, which sales were ratified by said James R. Thomas as guardian.

9. We find that the said James W. Terrell as Commissioner, in 1883 and 1884, sold and conveyed to J. F. Loomis and Xonophron Wheeler, poplar and white pine trees situate upon the lands of the estate in Graham and Swain counties to the amount of twenty-one hundred and eighty-one and fifty one-hundredths ($2,181.50) dollars, which were reported to and confirmed by the court; we find that this price was reasonable and fair value for the same at the time of the sale.

10. We find that Terrell as Commissioner contracted with John Cogdill lands belonging to the estate of William H. Thomas situate on Scott's creek, and that Thomas D. Johnston and James W. Terrell as Commissioners conveyed the same in pursuance of said contract of sale to John Cogdill one hundred and thirty-four acres, Samuel Cook one hundred and thirty-three acres, and to assignee of John Cogdill, assignee of John Cogdill, one hundred and thirty-three acres.

We find that the acreage conveyed was sold by estimate, and
112 not by actual survey; the boundary contained in the deed was lapped by lands of older title to the extent of four hundred fifty-seven acres. Your referees are unable to give the exact acreage contained in the boundary which they find from the evidence contained at least four hundred acres as testified to by the witness Cogdill. No computation of the acreage as shown by a competent surveyor was testified to before us.

11. The statement of the receipts and disbursements and allowance as between James W. Terrell, Commissioner, and the Thomas estate in the form of an account is as follows:

Cash received by Terrell:

Cash on hand		$14,927.91
Notes collected		4,442.22
Interest		1,124.32
Old notes collected		832.70
Amt. rec'd from Terrell & Johnston notes		1,388.08
By disbursements to Apl. 8-85	9,129.52	
" Gibbs heirs	700.48	
" Terrell and Thomas judgment	763.46	
" disbursements to Apl. 23, '86	9,384.30	
" Terrell on Thomas judgment	85.92	
" disbursements to Dec. 31, 1888	396.49	
" " " June 30, 1889	508.88	
" " " September 26, 1889	98.21	
" " " Jany. 1, 1896	1,648.	
	$22,715.26	$22,715.26
To amounts paid by J. R. Thomas		1,846.15
" cash retained on commissions		495.68
" seven notes retained on commissions		1,260.82

" amount land certificates (Long)		1,387.08
" amount McComb note		1,292.32
By ½ shortage on McComb note	248.32	
" ⅓ land certificate paid to Long	462.36	
" allowance for services	6,000.00	
To balance		428.63
	$6,710.68	$6,710.68

Which said amount of four hundred twenty-eight and sixty-three one-hundredths ($428.63) dollars we find that said Terrell is entitled to have and recover from the respondents in this proceeding, with interest from this date.

113 We conclude as matters of law as follows:

1. That this proceeding was properly begun in the Probate Court of Jackson County by virtue of Chapter 57 of Battle's Revisal, and that the Clerk of the Superior Court of said County by operation of law and statute in such case made and provided succeeded to the functions which the Probate Judge had theretofore exercised and had.

2. We conclude as matters of law that J. W. Terrell is responsible for two-thirds of the value of the land certificates which were secured through the services of A. J. Long, and that he had the right to make the contract for the payment to Long of one-third of the value thereof for his services rendered in that behalf.

3. We conclude as matter of law that said Terrell had a right to sell the timber on the Graham and Swain County lands with the approval of the Clerk of the Superior Court and that the order of said clerk protects him in the sales made to Loomis and Wheeler.

4. We conclude as matter of law that said Terrell is entitled to have and recover of the respondents in this cause the sum of four hundred twenty-eight and sixty-three one-hundredths ($428.63), with interest from the date of this report.

5. We conclude that the estate of William H. Thomas is liable for any cost in this special proceeding incurred, except such sum as may be allowed to the referees herein, of which cost to be allowed by the court we conclude that each side should pay annually, to-wit, one-half thereof, each.

6. The matter of our allowance we leave to the court.

The respondents reserved their right of trial by jury, as set out in the evidence.

Respectfully submitted, the 26th of February, 1905.

M. W. BELL,
THOS. A. JONES,
Referees.

We beg to report as a supplement to the foregoing:

That the expenses of M. W. Bell, Referee, to Webster, in the sum of twenty ($20.00) dollars, was paid on the 19th day of No-
114 vember, 1900, one-half by T. D. Johnston for J. W. Terrell, and one-half by R. D. Gilmer of counsel for the Thomas estate.

At the last taking of evidence it was agreed that the stenographer's services should be paid one-half by each side for services rendered to the referee by the stenographer in this behalf, for two days' services at five ($5.00) per day, ten ($10.00).

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STATE OF NORTH CAROLINA,
Jackson County:

Superior Court, Octo. Term, 1905.

In the Matter of WILLIAM H. THOMAS, Lunatic.

This cause coming on to be heard before his Honor, Walter H. Neill, Judge, holding the October Term of Jackson County Superior Court, 1905, and being heard upon the report of M. W. Bell and Thos. A. Jones, Referees:

And no exceptions having been filed to said report of said Referees:

It is accordingly, upon motion of Henry G. Robertson, of counsel for James W. Terrell, ordered and decrees be and the same is hereby confirmed in all particulars.

It is further considered and adjudged that James W. Terrell have and recover of the estate of Wm. H. Thomas, Lunatic, and of James R. Thomas and others, the respondents in this action, the sum of four hundred and twenty-eight and 63-100 dollars, with interest on the same from the 28th day of February, 1905, until paid.

It is further considered and adjudged that the said Jas. W. Terrell have and recover from the said estate of Wm. H. Thomas, Lunatic, and the respondents in this action, the costs incurred in this proceeding, to be taxed by the clerk.

WALTER H. NEILL,
Judge Presiding.

STATE OF NORTH CAROLINA,
Jackson County:

I, V. F. Brown, Clerk of the Superior Court of the County and State aforesaid, do hereby certify that the foregoing contains a full, true and perfect transcript of the record of the petition filed in the Court of Probate of said county on the 17th day of May, 1880, and of the findings of the probate judge thereon and his order
115 made upon such findings and of the report of James W. Terrell, commissioner, of the 8th day of April, 1885, and the order of the Clerk of the Superior Court thereupon, also the application of James R. Thomas for appointment as guardian of W. H. Thomas, Lunatic, the letters of Guardianship issued by the Clerk of the Superior Court of Jackson County, N. C., to said James R. Thomas, oath of James R. Thomas, Guardian, application of James R. Thomas, Guardian, to sell real estate, the findings of the Clerk of the Superior Court upon said application and the order thereupon

made: also petition of James R. Thomas, A. C. Avery and wife, Sallie L. Avery, James R. Thomas, administrator of W. H. Thomas, Sr., deceased, James R. Thomas, administrator of W. H. Thomas, Jr., deceased, Sallie Thomas, William Thomas, Love Thomas, De Witt Thomas, Bryan Thomas and May Thomas. Infant children and heirs at law of W. H. Thomas, Jr., deceased, by their guardian, James R. Thomas, of date Dec. 31st, 1898; also order and judgment of Felix E. Alley, Clerk of the Superior Court of Jackson County, made upon the hearing of said petition, dated July 6th, 1899; also agreement of counsel in said proceeding dated September 8th, 1899; also order of Felix E. Alley, Clerk of the Superior Court, transferring said cause to the trial docket of the Superior Court of Jackson County, N. C., also order of Albert J. Coble, Judge, in said cause, appointing M. W. Bell, Esq., referee and objection and exception of counsel; also a paper marked exhibit A, filed with the order of M. W. Bell and Thomas A. Jones, referees, also the report of M. W. Bell and Thomas A. Jones, Referees in said action and the order and decree of Walter H. Neil, Judge, confirming the report of said referees; as all of the same appear of record in my office.

In testimony whereof I have hereunto set my hand and affixed my official seal at office in the town of Webster, Jackson County, North Carolina, this the 17th day of February, A. D., 1909.

[SEAL OF COURT.] V. F. BROWN,
Clerk Superior Court, Jackson County, North Carolina.

Mr. FRY (continuing): Plaintiff now offers as evidence a copy of a deed purporting to have been made by Jas. W. Terrell, Commissioner of W. H. Thomas, Lunatic, to T. H. Lester, D. D. Lester and C. Y. Lester, of Swain County, on the 27th day of December, 1884, for the purpose and that purpose only of showing that this deed is the color or cloud to the plaintiff's title; plaintiff reserving the right to object to the deed, and the probate thereof, for any purpose which may see- proper. (Exhibit "E.")

116 PLAINTIFF'S "EXHIBIT E."

Deed James W. errell, Commissioner, T. H. Lester and Others to J. F. Loomis and Xenophen Wheeler.

U. S. Circuit Court. Filed Dec. 1, 1909. W. S. Hyams, Clerk.

Copy.

For and in consideration of the sum of one thousand sixty-eight dollars and fifty cents $1,068.50, to us paid by J. F. Loomis & Xenophen Wheeler of Chattanooga, Tennessee, the receipt of which is hereby acknowledged. We, James W. Terrill, Commissioner, to sell the lands of Wm. H. Thomas, a lunatic of Jackson County, N. C., and T. H. Lester, B. D. Lester & C. Y. Lester of Swain County, N. C., have bargained and sold and do by these presents, grant, bar-

gain, sell, transfer & convey unto the said J. F. Loomis & Xen-phen Wheeler, sixteen hundred and fifty-five poplar and twelve hundred and ninety-five pine trees, two feet and over in diameter at the butt; situated on our lands on the waters of Tennessee & Cheoah River in the 10th Land District of Graham County, N. C., covered by entries No. 1726, 1727, & 1728 made in Cherokee County before the creation of Graham County; and entries No. 299 & 398 made since the creation of Graham County, and described as follows:

Beginning at a chestnut oak at a cliff & runs thence N. 20 W. 240 poles to a pine; thence N. 85 E. 346 poles to a chestnut oak passing a chestnut corner at 6 poles; thence N. 20 W. to a stake in the line of 299, one hundred and ninety-nine poles; then with the line of No. 299 N. 25 E. 120 poles to a hickory, the beginning corner of No. 299, on the South bank of Tennessee River; then down said River with its meanders to its confluence with the Cheoah River; thence up the Cheoah with its meanders to the South boundary line of No. 1727; and thence with that N. 45 E. 106 poles to the beginning containing 2,000 acres of land be the same more or less; which poplar and pine trees are marked with the letter "L" all said J. F. Loomis & Xenophen Wheeler and their heirs and assigns shall have the right to enter upon the lands upon which said trees are situated and upon any other lands belonging to us for the purpose of cutting and removing said trees, and shall have the right of ingress—egress over the same and the right to make such roads over any of said lands suitable and proper to enable them to remove said
117 trees, whenever they may so desire. And we further agree with the party of the first part that we will not do anything or cause anything to be done to injure or kill said trees.

We covenant with the said J. F. Loomis & X-nophen Wheeler, their heirs and assigns that we are lawfully seized of said trees and have good right to sell and convey the same that they are unincumbered and further that we will forever warrant and defend the title to the same against the lawful claims of all persons whomsoever.

As witness our hands and seals on this 27th day of Dec., A. D., 1884.

JAMES W. TERRILL, *Com'r.* [SEAL.]
T. H. LESTER. [SEAL.]
B. D. LESTER. [SEAL.]
C. Y. LESTER. [SEAL.]

Witness:

JOHN ROBINSON.

NORTH CAROLINA,
Graham County:

OFFICE CLERK SUPERIOR COURT.

The foregoing instrument was on this the 31st day of Dec., 1884, duly proven by John Robinson, the subscribing witness thereto for the purpose therein contained, let said instrument with this certificate be registered.

JOHN G. TATHAM, *C. S. C.*

Registered Dec. 31st, A. D., 1884 (Book C of Deeds Records, Graham Co., N. C.)

W. F. MAUNEY,
Register of Deeds.

NORTH CAROLINA,
Graham County:

I, Robt. B. Slaughter, Register of Deeds in and for the County and State aforesaid, do hereby certify that the foregoing two (2) sheets, are true and correct copies from the records of the office of the Register of Deeds for Graham County, N. C.

Witness my hand and official seal at office in Robbinsville, N. C., on this the 6th day of July, 1908.

ROBT. B. SLAUGHTER,
[SEAL.] *Register of Deeds.*

118 Endorsed: Pl't'f's "E" Copy of Deed James W. Terrill, Com'r T. H. Lester and others to J. F. Loomis & Xenephon Wheeler, Graham Co. Dec. 27th, 1884.

(Judge Merrimon then said that they were not willing to have them filed in this case as evidence at all, as they were copies for which they had paid, but agreed that they may be submitted, with the understanding that they may be withdrawn and certified copies presented by plaintiff afterward.)

Mr. FRY (continuing): Plaintiff now offers for the same purpose as "Exhibit E," a deed purporting to have been made by Jas. W. Terrell, commissioner, to Loomis & Wheeler, dated the 27th day of December, 1884 (Exhibit "F").

PLAINTIFF'S EXHIBIT "F."

Copy Deed James W. Terrill, Commissioner, to J. F. Loomis and Xenophen Wheeler.

U. S. Circuit Court. Filed Dec. 1, 1909. W. S. Hyams, Clerk.

For and in consideration of the sum of five hundred and seventeen dollars and sixty-five cents, $517.65, to me paid by J. F. Loomis & Xenaphan Wheeler of Chattanooga, Tennessee, the receipt of which is hereby acknowledged, I, James W. Terrill, of Jackson County, N. C., by virtue of an order of the Judge of Probate for Jackson County, N. C., appointing me to sell and convey the lands of Wm. H. Thomas, a lunatic, have bargained, and sold, and do by these presents, grant, bargain, sell, transfer and convey unto the said J. F. Loomis & Xenaphan Wheeler, one thousand and seventy two poplar and one hundred forty-one pine trees, two feet and over in diameter at the butt; situated on the lands of said Thomas on the waters of Tennessee River and the Farley grant in Land District No. 10, Graham County, N. C., and covered by State Grant of entries

No. 595 & 1398 and by deeds from James Lyman and others described as follows, to-wit:

Beginning at a locust stake the corner of James Rymer & S. Whitaker in said Rymer's field, and runs West five hundred and thirty poles to a stake in the line of Entry No. 1728 then S. 20 E. to a chestnut oak corner of the same; then S. 85 W. — poles to a black oak; then S. 20 E. 350 poles passing a post oak corner of No. 1398 to a stake; then North 70 E. four hundred poles to a
119 chestnut oak; then N. 10 E. three hundred and fifty poles to the beginning—One thousand acres, more or less, which poplar and pine trees are marked with the letter "L" all. Said J. F. Loomis and Xenapham Wheeler, or their heirs and assigns shall have the right to enter upon the lands upon which said trees are situated, and upon any other lands belonging to said Thomas for the purpose of cutting and removing said trees and shall have the right of ingress and egress over the same, and the right to make such roads over any of said lands suitable and proper to enable them to remove said trees whenever they may so desire.

And we further agree with the party of the first part that I will not do anything, or cause anything to be done to injure or kill said trees. I covenant with the said J. F. Loomis & Xenophan Wheeler, their heirs and assigns that the said Thomas is lawfully seized of said trees, and that I am fully authorized, by the above cited order of the said Judge of Probate to sell and convey the same. That they are unincumbered and further, that I will forever warrant and the title defend against the claims of all persons claiming the same, in, through or by me, and against the claims of all persons whomsoever, so far as I am authorized and required to do by virtue of the said order of the said Judge of Probate and no further.

As witness my hand and seal on this the 27th day of December, 1884.

JAMES W. TERRILL, [SEAL.]
Commissioner.

Witness:

JOHN ROBINSON.

NORTH CAROLINA,
Graham County:

OFFICE CLERK SUPERIOR COURT.

The foregoing deed was on this the 31st December, 1884, duly proven by John Robinson, the subscribing witness for the purpose therein contained. Let the said deed, with this certificate be registered.

JOHN G. TATHAM, *C. S. C.*

Received & registered December 31st, 1884 (Book "C," page 172 & 3, Register's office, Graham Co., N. C.)

W. F. MAUNEY,
Register of Deeds.

120 In the Superior Court.

NORTH CAROLINA,
Graham County:

I, Robt. B. Slaughter, Register of Deeds in and for the County and State aforesaid, do hereby certify that the foregoing two (2) sheets are true and correct copies from the record in the Office of Register of Deeds for Graham Co., N. C.

Witness my hand and official seal at office in Robbinsville, N. C., on this the 6th day of July, 1908.

[SEAL.] ROBT. B. SLAUGHTER,
Register of Deeds.

Endorsed: Pl'ff's Exhibit F. Copy of Deed James W. Terrill, Commissioner, to J. F. Loomis & Xenophon Wheeler, Graham,' Dec. 27, 1884.

Plaintiff now offers copy of a deed (for the same purpose as those stated in connection with Exhibit "E") purporting to have been made by Jas. W. Terrell, by virtue of authority vested by the Judge of Probate, dated the third day of August, 1883. (Exhibit "G.")

PLAINTIFF'S EXHIBIT "G."

U. S. Circuit Court. Filed Dec. 1, 1909. W. S. Hyams, Clerk.

Know all men by these presents that I, James W. Terrill, by virtue of an order of the Judge of Probate for the County of Jackson and State of North Carolina, authorizing and empowering me to sell the lands of Wm. H. Thomas, a lunatic, have for and in consideration of the sum of one thousand one hundred and twenty-nine dollars and sixty cents to me paid by J. F. Loomis and Xenophone Wheeler of Chattanooga, Tennessee, the receipt of which is hereby acknowledged, bargained and sold and by these presents do grant and sell, transfer and convey unto the said J. F. Loomis and Xenophone Wheeler two thousand two hundred and seventy-two pine trees and one thousand two hundred and forty-eight poplar trees two feet and over in diameter at the but. Situated on nine tracts of the Wm. Thomas lands on the north bank of the Tennessee River in the County of Swain and State of North Carolina. Said
121 tracts beginning on the Tennessee state line and joining each other, and each and every tract bounded on the south by said river, and extending up said river as far as state survey No. 30, the said nine tracts being granted to Wm. H. Thomas in grants No. 1499-1500-1502-1503-1504-1505-1506 and 1507. All of said trees are plainly marked with the letter (L). Said Loomis and Wheeler or their heirs and assigns shall have the right to enter upon the land upon which said trees are situated and upon any other land belonging to said Thomas continuous for the purpose of cutting and removing said trees and shall have the right of ingress and egress over the

same, and the right to make such roads over any of said lands suitable and proper to enable them to remove said trees whenever they may so desire. And I further agree that I will not do anything or cause anything to be done to injure or kill said trees. And I further covenant to warrant and defend the title to the said trees against the claims of all persons claiming the same through me, and against the claims of all other persons so far as I am authorized and required to do by the said order of the said Probate Judge and no further. Witness my hand and seal. This the 3rd day of August, 1883.

(Signed) JAMES W. TERRILL. [SEAL.]

Witness:

(Signed) JOHN ROBINSON.

Upon reading the foregoing deed of conveyance of trees and it being made to appear to me, that J. W. Terrill is the commissioner of the court to make sale of the real property of W. H. Thomas under the orders of the court and it further appearing that a sale of a portion of the same is necessary and that the sale made is reasonable and fair. It is therefore approved at Chambers, Marshall Aug. 9th, 1883.

(Signed) J. C. L. GUDGER,
Judge Presiding.

STATE OF NORTH CAROLINA,
Swain County:

In Probate Court.

The execution of the foregoing Deed from J. W. Terrill to J. F. Loomis & Xenophone Wheeler was duly proven by the oath and examination of John Robinson the subscribing witness thereto, also the certificate of J. C. L. Gudger of the 9th Judicial District of North Carolina, is adjudged to be correct. Let the said deed together with this certificate be registered. This August the 31st, 1883.

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(Signed) W. R. GRANT,
Judge of Probate.

Filed for registration Aug. 31st, 1883, Registered on this Aug. 31st, A. D., 1883.

N. B. THOMPSON,
Reg'r of Deeds.

NORTH CAROLINA,
Swain County:

I. W. L. Francis, register of deeds for Swain County, N. C., do hereby certify that the foregoing two pages is a true and accurate copy of the foregoing deed for trees from J. W. Terrill to Loomis and Wheeler as it appears on the records of my office in book "D"

of deeds at pages 46-47. Witness my hand and official seal this July 7th, 1908.

W. L. FRANCIS,
Register of Deeds.

Plaintiff now offers in evidence a copy of a deed purporting to have been made and executed by J. F. Loomis and Zenovin Wheeler and their wives, on the 29th day of April, 1907, to W. C. Heyser, for the same purposes, as those stated under Exhibit "E." (Exhibit "H.")

EXHIBIT "H."

Deed Loomis and Wheeler to W. C. Heyser.

U. S. Circuit Court. Filed Dec. 1, 1909. W. S. Hyams, Clerk.

STATE OF NORTH CAROLINA,
Graham County:

This Indenture made and entered into on this the 29th day of April, A. D., 1907, by and between J. F. Loomis and wife, Emily E. Loomis, and Xenephon Wheeler and wife, Elizabeth W. Wheeler, of the City of Chattanooga and State of Tennessee, parties of the first part, and W. C. Heyser, of the town of Concord and State of Tennessee, party of the second part:

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Witnesseth that the said parties of the first part for and in consideration of the sum of ten dollars to them in hand paid, by the said party of the second part, the receipt of which is hereby acknowledged, and other good and valuable considerations, has this day given, granted, confirmed and quit claimed and by these presents doth give, grant, release, confirm and quit claim, unto the said party of the second part, his heirs and assigns all their right, claim, interest and property in and to certain timber trees of the kinds and size hereinafter described situated, standing and being upon the following described tracts of land lying in the County of Graham and State of North Carolina:

1st Tract. One thousand and seventy-two (1,072) poplar, and one hundred and forty-one (141) pine trees, two feet and over at the butt situated on the waters of the Tennessee River and the Farley branch in land District No. 10, of Graham County, N. C., and being covered by State grant of entries #595 and #1398 beginning at a locust stake the corner of James Rymer and S. Whittaker, in said Rymer's field, and runs west 530 poles to a stake in the line of entry #1728; thence south 20 East to a chestnut oak, corner of the same, thence south 85 west — poles to a black oak; thence South 20 East 350 poles, passing a post oak, corner of #1398, to a stake; thence north 70 East 400 poles to a chestnut oak; thence North 10 East 350 poles to the beginning containing one thousand (1,000) acres, more or less.

The above mentioned poplar and pine trees are marked with the letter "L."

The above mentioned timber trees being those conveyed to J. F. Loomis and Xenephon Wheeler by Jas. W. Terrell, Commissioner, by deed bearing date the 27th day of December, 1884, and recorded in the Records of Graham County in Book "C", page 172 on the 31st day of December, 1884.

2nd Tract. Sixteen hundred and fifty-five (1,655) poplar and twelve hundred and ninety-five (1,295) pine trees, two feet and over at the butt. Situated on the waters of the Tennessee River in land District #10 of Graham County, N. C., and being covered by entries #1726, 1727 and 1728. (These entries were made in the County of Cherokee before the creation of Graham County), and Entries #299 and #398, made in Graham County and more particularly described and bounded as follows: Beginning on an oak at a cliff and runs thence North 20, West 240 poles to a pine; thence North 85, East 346 poles to a chestnut oak, passing a chest-
124 nut corner at six (6) poles; thence North 20, West, to a stake in the line of #299, 199 poles; thence with the line of #299, North 25, East 120 poles to a hickory, the beginning corner of #299 on the South bank of the Tennessee river; thence down said river with its meanders to its confluence with the Cheoak River; thence up the Cheoah River with its meanders to the South boundary line of #1727 and thence with that North 45, East 106 poles to the beginning.

Containing two thousand (2,000) acres more or less.

The above mentioned poplar and pine trees are marked with the letter "L."

The above mentioned timber trees were those conveyed to J. F. Loomis and Xenaphon Wheeler by Jas. W. Terrell, Commissioner, T. H. Lester, B. D. Lester and C. Y. Lester by deed dated the 27th day of December, 1884, and recorded in the records of Graham County, N. C., in book "C," page 180, on the 31st day of December, 1884.

. 3rd Tract. Seven hundred and five (705) poplar, ash, yellow cucumber, and two hundred and thirty-one (231) pine trees, two feet and more in diameter at the butt. Situated on the waters of the Tennessee River in District #10 of Graham County, N. C., and covered by Entry #292 and described as follows, to-wit:

Beginning on a small poplar, on the South side of said river, J. D. Frank's North East corner, 275 poles below the mout- of Pace Cove branch and runs with his line, South 85 West, 320 poles to a black oak, his corner and also North West corner of #291; thence South 19 East, with said No. 353 poles to a stake, corner of said number; thence South, 65, East, 18 poles to a stake; thence North, 72, West, 350 poles to a small white oak on the top of a ridge; thence North 25, East 320 poles to a hickory on the South bank of the Tennessee River, below Rocky Point, thence up said river as it meanders to the beginning.

Containing six hundred (600) acres more or less.

The above poplar, pine and ash trees are marked with the letter "L."

The above mentioned timber trees being those conveyed to J. F.

Loomis and Xenaphon Wheeler by James Rymer and wife, Sarah E. Rymer, by deed executed on the 29th day of November, 1884, and recorded in the Records of Graham County on the 6th day of December, 1884, in book "C," page 151.

4th Tract. Three hundred and ten (310) poplar and forty-eight (48) pine trees two feet and over in diameter at the butt, in fact all the poplar, ash, yellow cucumber and pine trees that are two
125 feet in diameter at the butt situated on our lands in Graham County, N. C., said land being covered by entries #958 and #959 and bounded and described as follows: Lying on the Farley branch in District #10.

(*a*) Beginning on a chestnut, southeast corner of #1388 and runs South 70 East with said number, 127 poles to a chestnut; thence South 17 East 37 poles to a black oak, northwest corner of —; thence East with the line of the same, 270 poles to a chestnut oak on the line of #595; thence North 220 poles to a chestnut on the bank of said branch; thence South 77 West up said branch, 80 poles to a chestnut on the line of #1388; thence South 70 East with said line, 100 poles to the beginning.

Containing one hundred and twenty-two (122) acres.

(*b*) Beginning on a stake and chestnut oak, southeast line of #1728 and runs South 85 West with said number 337 poles to a black pine, southwest corner of said number and on the line of #1727; thence South 20 East with said number, 55 poles to a chestnut, northeast corner of #1389; thence North 85 East 160 poles; thence South 5 East with a former line, 61 poles to a chestnut; thence South 75 East with a former line, 110 poles to a small spanish oak on the line of #1388; thence North 40 West with said number, 88 poles to a post oak, northwest corner of —; thence South 70 East with same 127 poles to a beech, northeast corner of said number; thence North 20 West 60 poles to the beginning.

Containing one hundred and fifty-two acres.

Three hundred and fifty-eight (358) of which poplar, ash, yellow Cucumber and pine trees are marked with letter "L."

The above mentioned timber trees being those conveyed to J. F. Loomis and Xenaphon Wheeler by Jacob Shope, B. A. Shope, Kimsey Grant and wife Julia Grant, by deed dated 3rd day of February, 1888, and recorded in the records of Graham County, N. C., in Book "C," page 252 on the 4th day of February, 1888.

5th Tract. All of the poplar, ash, yellow cucumber and pine trees two feet and over in diameter at the butt situated on the following described tract of land lying on Yellow Creek in District #10 of Graham County and described as follows:

Beginning on a large rock and spanish oak, corner of #234, and runs East 75, West 200 poles to a stake on the Cheoah River; thence North 41 West with the meanders of said river, 125 poles to a stake on the line of #7080; thence East 60 West 20 poles with said line to a stake; thence North 60 East with said line, 180 poles to
126 a black oak, thence North 30 West 90 poles to a stake near big road; thence South 60 West 20 poles to a fallen hickory, beginning corner of #2638; thence North with said line 180 poles

to a stake and locust; thence south 85 East 256 poles to a stake; thence South 315 poles to a stake on the line of [illegible] near big road; thence East 75 West 88 poles to the beginning. Containing six hundred and forty (640) acres.

Three hundred of which poplar, ash, yellow cucumber and pine trees are marked with the letter "L."

The above described timber trees being those conveyed to J. F. Loomis and Xenophon Wheeler by J. J. Colvard and wife, Nancy M. Colvard, by deed dated the 25th day of September, 1884, and recorded in the Records of Graham County, N. C., in Book "C," page 56, on the 30th day of September, 1884.

To have and to hold the aforesaid timber trees situated on the tracts of land above described, unto the said W. C. Heyser, party of the second part, his heirs and assigns, together with all the rights, privileges and appurtenances thereunto belonging, to their only use and behoof forever, free and clear from any and all encumbrances.

In testimony whereof the said parties of the first part have hereunto set their hands and seals on this the day and year first above written.

J. F. LOOMIS. [SEAL.]
EMILY E. LOOMIS. [SEAL.]
XENOPHONE WHEELER. [SEAL.]
ELIZABETH W. WHEELER. [SEAL.]

STATE OF TENNESSEE,
Hamilton County:

I, H. C. Arnold, a Notary Public in and for the County of Hamilton and State of Tennessee, do hereby certify that J. F. Loomis and wife, Emily E. Loomis, and Xenophon Wheeler and wife, Elizabeth W. Wheeler, personally appeared before me this day and acknowledged the due execution by them of the foregoing and annexed deed of conveyance for the purposes therein expressed; and the said Emily E. Loomis, wife of said J. F. Loomis and Elizabeth W. Wheeler, wife of Xenophon Wheeler, being by me privately examined, separate and apart from their said husbands, touching their voluntary execution of the same do state, each for herself, that they signed the same freely and voluntarily, without fear
127 or compulsion of their said husbands or any other person and that they do still voluntarily assent thereto.

In witness whereof I have hereunto set my hand and affixed my notarial seal this the 29th day of April, 1907.

H. C. ARNOLD,
Notary Public for Hamilton County, Tenn.
[NOTARIAL SEAL.] Notary Public.
[L. S.]

My commission expires *commission expires* Aug. 10, 1908. *190*

STATE OF NORTH CAROLINA,
Graham County:

The foregoing certificate of H. C. Arnold, a Notary Public in and for Hamilton County, Tennessee, evidenced by his Notarial Seal is adjudged to be correct, sufficient, in due form and according to law and the said instrument is adjudged to be duly proven. Let the instrument with the certificate be registered.

Witness my hand and official signature this the 10th day of Sept., A. D., 1907.

EARL P. TATHAM,
Clerk Superior Court.

Registered in the office of Register of Deeds for Graham Co., N. C., in Book "2" of Deeds on page 457 etc. This Sept. 11, 1907.

ROBT. B. SLAUGHTER,
Register of Deeds.

Endorsed: Loomis & Wheeler to W. C. Heyser, Book "2," page 457, Graham County, N. C.

Plaintiff now offers in evidence a deed purporting to have been executed by W. C. Heyser, and Elizabeth A. Heyser, his wife, on the first day of February, 1908, to the Brunswick-Balke Colander Corporation. This introduced for the same purposes as those stated inconnection with Exhibit "E." (Exhibit "I.")

128 PLAINTIFF'S EXHIBIT "I."

Deed W. C. Heyser to the Brunswick-Balke-Collander Co.

U. C. Circuit Court. Filed Dec. 1, 1909. W. C. Hyams, Clerk

STATE OF NORTH CAROLINA,
County of Swain, ss:

This indenture made and entered into on this twenty-first day of February, A. D. 1908, by and between W. C. Heyser and Elizabeth A. Heyser his wife both of the city of Knoxville, county of Knox in the state of Tennessee; parties of the first part and The Brunswick-Balke-Collender Company, a corporation under the laws of the state of Delaware, party of the second part.

Witnesseth: That the said parties of the first part for and in consideration of the sum of one dollar ($1.00) to them in hand paid by the said party of the second part the receipt of which is hereby acknowledged, and other good and valuable considerations, have this day given, granted, confirmed and *and* quit-claimed and by these presents do give, grant, release, confirm and quit-claim unto the said party of the second part, its successors and assigns, all their the said parties of the first part's right, claim, interest and property in and to certain timber trees of the kinds and size hereinafter described.

Situated standing and being upon the following described tracts of land, lying in the County of Swain and State of North Carolina, to-wit:

Two thousand two hundred and seventy-two (2,272) pine trees and one thousand two hundred and forty-eight (1,248) poplar trees two (2) feet and over at the but-, situated on nine (9) tracts of the Wm. H. Thomas lands on the north bank of the Tennessee river in the County of Swain and State of North Carolina. Said tracts beginning on the Tennessee State line and joining each other and every tract bounded on the south by said river, and extending up said river as far as State survey No. 30; the said nine tracts being granted to Wm. H. Thomas in Grants Numbers 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, and 1507, all of said trees being marked with the letter "L" and being the same timber trees conveyed by James W. Terrill to J. F. Loomis and Xenophone Wheeler by deed dated Aug-st 3rd, 1883, which deed is registered in book "D," at pages 46 et seq. Records of Deeds for Swain County,
129 North Carolina, to which reference is hereby made for a full and complete description of the same;

Also one hundred and seven (107) poplar and eighteen (18) white pine trees two (2) feet and over at the but- situated on the W. B. Allen lands in Swain County, North Carolina, on the waters of the Tennessee River and bounded as follows:

First Tract: Beginning at a white oak on the north bank of the Tennessee River above the mouth of twenty mile creek and runs North 118 poles crossing twenty mile creek to a birch; thence South 83 East 130 poles to a chestnut; thence South 120 poles to the river; thence up the river; with its meander to the beginning, containing one hundred (100) acres more or less.

Second Tract: Known as Rocky Point beginning at a chestnut, corner of —— land, and runs South 83 East 198 poles to a pine; then South 20 West about 100 poles to the present survey of the Railroad near the river; then up the river with the Railroad line to a stake in said Railroad line to a point exactly south of the beginning; then North to the beginning, containing one hundred and ninety (190) acres, more or less.

Which said timber trees are marked with the letter "L" and are the same timber trees conveyed by W. B. Allen and wife to J. F. Loomis and Xenophone Wheeler by deed dated May 8th, 1885, which deed is registered in book "E," at pages 236 and 237, Records of Swain County, North Carolina, on the 20th day of May, 1885, to which deed reference is hereby made for a full and complete description.

All of said timber trees hereinabove mentioned and described being the same timber trees conveyed by W. C. Heyser and Elizabeth A. Heyser, his wife, grantors herein to the Brunswick-Balke-Collender Company of Ohio. Predecessors in title of the party of the second part herein, by deed dated September 4th, 1907, said deed being recorded on September 11, 1907, on page 497, et seq. of book "A. D." of Deeds for Swain County, North Carolina; and this deed being made to the party of the second part herein because

of inadvertence and mistake in said deed last above mentioned in that in the habendun clause of said deed the name of W. C. Heyser was inserted instead of the name of the Brunswick-Balke-Collender Company of Ohio, and this deed is given to correct and cure such error. To have and to hold, the aforesaid timber trees situated on the tracts of land above described. Together with all the rights, privileges and appurtenances thereunto belonging free and clear from any and all incumbrances unto the said The Brunswick-Balke-Collender Company, a corporation, under the laws of the state of Delaware, its successors and assigns forever.

In testimony whereof the said parties of the — part have hereunto set their hands and seals on this the day and year first above written.

W. C. HEYSER. [SEAL.]
ELIZABETH A. HEYSER. [SEAL.]

Attest:
JOHN R. ROGERS.
JACOB STEKETEE.

[NOTARIAL SEAL.]

STATE OF MICHIGAN,
County of Kent, ss:

I, Jacob Steketee, a Notary Public in and for the county of Kent, in the State of Michigan, do hereby certify that Elizabeth A. Heyser, who is the wife of W. C. Heyser and who is personally known to me, personally appeared before me this day and acknowledged the due execution by her of the foregoing and annexed deed of conveyance for the purposes therein expressed and the said Elizabeth A. Heyser, wife of the said W. C. Heyser being by me privately examined separate and apart from her said husband touching her voluntary execution of the same does state for herself that she signed the same freely and voluntarily without fear or compulsion of her said husband or any other person and that she does still voluntarily assent thereto. In witness whereof I have hereunto set my hand and affixed my notarial seal. This 28th day of March, A. D., 1908.

JACOB STEKETEE,
[NOTARIAL SEAL.] *Notary Public, Kemp County, Michigan.*

My commission expires Feb. 26, 1910.

STATE OF NORTH CAROLINA,
Swain County, ss:

The foregoing and annexed certificate of Jacob Steketee, a Notary Public in and for the County of Kent, in the State of Michigan, duly authenticated by his notarial seal is adjudged to be correct, in due form and according to law. And the foregoing and annexed deed of conveyance is adjudged to be duly proven.

131 Let the foregoing and annexed deed together with said certificate and this certificate be registered. Witness my hand this the 2 day of April, A. D., 1908.

O. P. WILLIAMS,
Clerk Superior Court, Swain County.

STATE OF NORTH CAROLINA,
Swain County:

The execution of the foregoing deed was this day duly proven before me, O. P. Williams, Clerk of the Superior Court in and for the County aforesaid by the acknowledgment of W. C. Heyser. of the grantors therein named. Let the same with this certificate be registered.

This 2 day of April, 1908.

O. P. WILLIAMS,
Clerk Superior Court.

The foregoing deed was filed for registration in this office at 10 oclock A. M. April 2nd, 1908, and registered April 2nd, 1908, in Book "AF" pages 263, etc., Record of Deeds of Swain County.

W. L. FRANCIS,
Reg. of Deeds.

NORTH CAROLINA,
Swain County:

I, W. L. Francis, Register of Deeds for Swain County, State aforesaid, do hereby certify that the foregoing 4 pages is a true and accurate copy of the foregoing deed from W. C. Heyser and wife to The Brunswick-Balke-Collender Company as it is recorded in my office in Book AF, at page- 263, et seq. Records of Deeds.

Witness my hand and official seal this the 9th day of July, 1908.

W. L. FRANCIS,
[SEAL.] *Register of Deeds.*

Endorsed: W. C. Heyser to the Brunswick-Balke-Collander Co. Deeds Pl'ff's Exhibit "I."

132 DEFENDANT'S EXHIBIT "I. I."

Deed, Loomis and Wheeler to W. C. Heyser.

U. S. Circuit Court. Filed Dec. 1, 1909. W. S. Hyams, Clerk.

STATE OF NORTH CAROLINA,
Swain County:

This Indenture made and entered into on this the 29th day of April, A. D., 1907, by and between J. F. Loomis and wife, Emily E. Loomis and Xenephon Wheeler and wife, Elizabeth W. Wheeler, of the City of Chattanooga, and State of Tennessee, parties of the

first part, and W. C. Heyser of the Town of Concord, and State of Tennessee, party of the second part:

Witnesseth, that the said parties of the first part, for and in consideration of the sum of ten dollars to them in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, and other good and valuable considerations, has this day given, granted, confirmed and quit claimed and by these presents doth give, grant, release, confirm and quit claim unto the said party of the second part, his heirs and assigns, all their right, claim, interest and property in and to certain timber trees of the kinds and size hereinafter described, situated, standing and being upon the following described tracts of land lying in the County of Swain and State of North Carolina:

Two thousand two hundred and seventy-two (2,272) pine trees and one thousand two hundred and forty-eight (1,248) poplar trees, two (2) feet and over at the butt, situated on nine (9) tracts of the Wm. H. Thomas lands on the North bank of the Tennessee river in the County of Swain and State of North Carolina, said tracts beginning on the Tennessee State line and joining each other, and each and every tree bounded on the South by said river and extending up said river as far as State survey #30; the said nine tracts being granted to Wm. H. Thomas in grants number 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506 and 1507, all of said trees being marked with the letter "L" and being the same timber trees conveyed by James W. Terrell to J. F. Loomis and Xenophon Wheeler by deed dated August 3rd, 1883, which deed is registered in Book "D," at pages 46 et seq. Records of Deeds for Swain County, N. C., to which reference is hereby made for a full and complete description of the same.

133 Also one hundred and seven (107) poplar and eighteen (18) white pine trees two (2) feet and over at the butt, situated on the W. B. Allen lands in Swain County, North Carolina, on the waters of the Tennessee river and bounded as follows:

1st Tract. Beginning at a white oak on the North bank of the Tennessee river above the mouth of Twenty Mile creek and runs North 118 poles crossing Twenty Mile Creek to a birch; thence South 83 East, 130 poles to a chestnut; thence South 120 poles to the river; thence up the river with its meanders to the beginning, containing one hundred (100) acres more or less.

2nd Tract. Known as Rocky Point, beginning at a chestnut, corner of — land and runs South 83 East 198 poles to a pine; then South 20 West about 100 poles to the present survey of the railroad near the river; then up the river with the railroad line to a stake in said railroad line to a point exactly South of the beginning; then North to the beginning, containing one hundred and ninety acres, more or less.

Which said timber trees are marked with the letter "L" and are the same timber trees conveyed by W. B. Allen and wife to J. F. Loomis and Xenophon Wheeler by deed dated May 8th, 1885, which deed is registered in Book "E," at pages 236 and 237, Records of

Swain County, N. C., on the 20th day of May, 1885, to which deed reference is hereby made for a full and complete description.

To have and to hold the aforesaid timber trees situated on the tracts of land above described, together with all the rights, privileges and appurtenances thereunto belonging, free and clear from any and all encumbrances, unto the said W. C. Heyser, his heirs and assigns forever.

In testimony whereof the said parties of the first part have hereunto set their hands and seals this day and year first above written.

J. F. LOOMIS. [SEAL.]
EMILY E. LOOMIS. [SEAL.]
XENOPHAN WHEELER. [SEAL.]
ELIZABETH W. WHEELER. [SEAL.]

STATE OF TENNESSEE,
Hamilton County:

I, H. C. Arnold, a Notary Public in and for the County of Hamilton and State of Tennessee, do hereby certify that J. F. Loomis and wife, Emily E. Loomis and Xenophon Wheeler and wife, Elizabeth W. Wheeler, personally appeared before me this day and
134 acknowledged the due execution by them of the foregoing and annexed deed of conveyance for the purposes therein expressed; and the said Emily E. Loomis wife of J. F. Loomis, and Elizabeth W. Wheeler, wife of Xenaphon Wheeler, being by me privately examined, separate and apart from their said husbands touching their voluntary execution of the said — do state, each for herself, that they signed the same freely and voluntarily, without fear or compulsion of their said husbands or any other person and that they do still voluntarily assent thereto.

In witness whereof I have hereunto set my hand and affixed my notarial seal this the 29th day of April, 1907.

H. C. ARNOLD,
Notary Public Notary Public *for* Notary Public
[L. S.] Notary Public for *Hamilton County.*

My Commission expires *Commission expires* Aug. 10, 1908.

STATE OF NORTH CAROLINA,
Swain County:

The foregoing certificate of H. C. Arnold, a Notary Public for Hamilton County, Tennessee, evidenced by his Notarial Seal is adjudged to be correct, sufficient, in due form and according to law, and the said instrument is adjudged to be duly proven.

Let the instrument with the certificates be registered.

Witness my hand and official signature this the 10 day of Sept., 1907.

O. P. WILLIAMS.
Clerk Superior Court.

The above instrument was filed for record on Sept. 10, 1907, at 4 o'clock P. M., duly recorded Sept. 11, 1907, at 12 o'clock M. on page 500 et seq. of Book "A. D." of Deeds for Swain Co. N. C.

R. W. WRIGHT,
Register of Deeds.

Endorsed: Loomis and Wheeler to W. C. Heyser.

Judge MERRIMON: The only thing we need to offer now, is the petition of Dr. W. H. Hilliard, filed on the 17th day of May, 1880. I want to read a few passages in order to show that it comes within the section of the Revisal referred to a while ago. (Reads
135 from petition.) It was on the findings and conclusions from this petition that Terrell was appointed. (Reads further from petition.) Then comes a report of sales by Terrell. At the end is this entry (reads). After that, may it please your Honor, the Clerk of the Superior Court appointed Jas. R. Thomas, as Guardian in place of Terrell.

Mr. TUCKER: If Judge Merrimon is going to file that, we had better enter our objections.

Judge MERRIMON: We do not mind further objections.

The COURT: Let is be entered subject to objections.

Judge MERRIMON: I want to call particular attention to the fact that Jas. R. Thomas was appointed Guardian after the death of Hilliard (reads from petition).

Mr. TUCKER: Plaintiff objects to the offering of that part of the Record in the case of W. H. Thomas, lunatic. We object to all that proceeding of J. R. Thomas, to the close of it, for these reasons: (1) That the plaintiff and those under whom he claims were not a party to these proceedings, since the land was conveyed from the heirs of W. H. Thomas, to those under whom he claims? (2) that W. H. Thomas, or his heirs had any claim to this land at the time this proceeding was begun.

Judge MERRIMON: This was in original petition of Dr. Hilliard.

The COURT: I understand that this was a petition filed in the proceedings originally instituted by Hilliard, by virtue of which there was a final decree in pursuance of the original decree.

Mr. ADAMS: As I understand it (I may be wrong), after W. H. Thomas died (or perhaps before he died) James M. Thomas did qualify as his guardian and got a new order to sell land. Afterwards Thomas died and young Jim Thomas, qualified as administrator and started new proceedings in the Probate Court of Jackson County in which he charged Terrell and undertook to make certain recoveries. This last proceeding was consolidated by order of the clerk with the old record. This consolidation, under which they undertook to consolidate the Commission, is what we object to.

136 Judge MERRIMON to Mr. Adams: What is the date of your petition?

Mr. ADAMS: 1903.

Judge MERRIMON: This one is 1883.

Judge Merrimon then proceeds with the reading of the petition in the matter of W. H. Thomas, Lunatic. After finishing, he said: This is to show that James Thomas, as Guardian of his father, was simply the successor of Dr. Hilliard, in the same suit. The petition goes on and Terrell filed his answer to that, and this order is made: (reads) which is dated September 18th, 1899. I want to call attention to the statute of 1877 which provides that this case took absolute jurisdiction. Now comes the order referring this matter to Bell, May 24th, 1899, at Murphy, which reads as follows: (reads) Now comes report of Bell and Jones (Jones was added to reference by consent) in the matter (reads). Now, at the October, 1905, term this order was made (reads), which was issued after the report of Bell and Jones was filed. I have read these to show that the court had jurisdiction, and that jurisdiction was transferred to the Superior Court under the act of 1877 and that Bell was originally appointed by the Superior Court Judge; and that subsequently the Superior Court Judge confirmed this whole business. As to this being the land embraced in these deeds, they set forth in the petition filed by Thomas that all of the lands were to be sold, and it was understood that this was all the lands. He did sell to the extent of 25,000 of these lands. I think the record itself establishes the identity, without introducing any further documentary evidence.

Continuing, Judge MERRIMON said: I want to offer the same copy of the deed exhibited by plaintiff and known as *their* Exhibit "E" to show that it was registered in Graham County on the 31st of December, 1884, in Book "C" of Deeds.

Mr. FRY: We want to object on the ground that it was not properly certified.

Judge MERRIMON: The other paper which I wish to introduce (the same as Exhibit "F" of plaintiff), was registered on the same date, as shown by the records of the Registrar of Deeds, pages 172 and 173 Book "C," in Graham County.

Mr. FRY: Plaintiff offers same objection.

137 Mr. MERRIMON: I would like to ask if plaintiff can introduce as evidence himself a deed to which he has objections (as this is the same paper which he just introduced). He now states it is not properly probated.

The COURT: It is not a question of probate. If it is not a deed properly probated and registered, of course it is a question as to whether it constituted a cloud.

Mr. TUCKER: How is the court to know, if we cannot produce this defective deed? We claim it defective from one end to the other. We introduced it with the distinct understanding that it was for the purpose of showing defective record, and that it is the only way we can do so. In another case, in which Judge Merrimon was interested, he did exactly this very thing.

Judge Merrimon denies the allegation.

The COURT: As I understand it, this deed is introduced by the plaintiff, and then he kicks when you (to Judge Merrimon) wish to introduce the same instrument?

Judge Merrimon answers in the affirmative.

Mr. FRY: Plaintiff objects to the introduction by Judge Merrimon of the first deed (Exhibit "E") on the ground that it has not been properly certified by the Register of Deeds. We also object to the second offering by Judge Merrimon on the same ground.

Judge MERRIMON: Defendants now offer in evidence the deed from Loomis & Wheeler to W. C. Heyser (which has been previously offered by plaintiff) for the purpose of showing that the same was registered in the office of the Registrar of Deeds in the County of Graham on the 10th day of September, 1907, this original deed, being in Book "Q" of Deeds, page 457; the next deed is one from Terrell to Loomis and Wheeler which we offer to show the registration in the County of Swain August 31st, 1883, in Book "D" of Deeds at pages 46 and 47. This is the original paper.

Plaintiff withdraws all objections as regards probate and certificates of deeds.

Adjournment taken until 10:00 A. M. following day.

138 Hearing at 10 o'clock April 29th, 1909.

The COURT: When were the proceedings entered by virtue of which these tracts were conveyed to defendants?

Judg MERRIMON: In 1880—14th & 15th of May, 1880.

The COURT: When were proceedings entered by virtue of which you have based the findings of facts and conclusions of law and the passing of title to Bailey and others?

Judge MERRIMON: To answer that, I will have to make a statement. After Hilliard resigned the guardianship, Jas. R. Thomas, son of Wm. H. Thomas, having become of age, was placed as Guardian. He put in another petition. He succeeded Terrell. That was entered October 25th, 1889.

The COURT: When was the final decree entered in pursuance of this?

Judge MERRIMON: Not until Judge Neil entered it in 1905.

The COURT: When *was* proceedings under which plaintiff claims title entered?

Mr. ADAMS: Commenced and completed in 1903.

The COURT: Were these parties (plaintiffs) parties to the proceedings instituted by Thomas?

Judge MERRIMON: Not at first.

The COURT: When did they become?

Judge MERRIMON: They never were parties to it. After Thomas became Guardian in 1889 and took Terrell's place, he proceeded to make sales and continued until 1899, when this petition was filed. It reads as follows: (reads) This is the petition in which Terrell is charged with fraud.

The COURT: Under whom do plaintiffs claim?

Mr. ADAMS: Under the heirs of W. H. Thomas, by descent, after his death.

139 *Objections by Plaintiff.*

U. S. Circuit Court. Filed Nov. 29, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD
vs.
BRUNSWICK-BALKE-COLLENDER COMPANY.

Objections by Plaintiff.

The plaintiff objects to the introduction by the defendant of all the proceeding contained in the record entitled: "In the matter of the estate of William H. Thomas, lunatic," after the words "J. W. Fisher, Clerk of the Superior Court," on page "22," of Exhibit "D," and every part thereof, and every recital or statement made therein by either the petitioners, respondents, clerk of the court, judge of the superior court, or referees, or attorneys of record therein of any matter or matters of fact or facts or law and all agreements of counsel of record therein on the ground: That every part or parts therein are irrelevant, incompetent and immaterial, and not made in the proceeding in which the decree for the sale and report of sale or pretended sale of said land was made, but a long time thereafter; and upon the further ground that the parties to said proceedings, with the exception of W. H. Thomas, lunatic, were entirely different parties than those in the poceeding under which the said pretended sale was made.

That the plaintiff specifically objects to each and every of the pleadings, petitions, orders, affidavits, decrees, reports, confirmations, recitals, agreements and each and every statement and every finding of fact and conclusion of law in each and every of them, contained in the record of Exhibit "D," from and after the words: "J. W. Fisher, Clerk Superior Court," on page "22," for that the same are irrelevant, immaterial and incompetent to the question at issue in this cause.

J. S. ADAMS,
J. H. TUCKER,
A. M. FRY,
A. D. RABY,
Attorneys for Plaintiff.

140 *Decree.*

U. S. Circuit Court. Filed June 1, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY and W C. HEYSER, Defendants.

Decree.

This cause came on the 28 day of April, 1909, to be heard and debated before the Honorable J. C. Pritchard, Circuit Judge of the United States for the Fourth Circuit, in the presence of counsel learned for plaintiff and defendant, The Brunswick-Balke-Collender Company, upon debate of the matter, and hearing what was alleged by counsel on both sides in relation to the issues raised by the pleadings touching the validity and construction of certain deeds of conveyance for certain timber trees:

1. A deed from James W. Terrell, Commissioner, to J. F. Loomis and Xnenphon Wheeler, dated the 3rd day of August, 1883.

2. A deed from the said Terrell, Commissioner, to *take* the said Loomis and Wheeler, dated the 27th day of December, 1884.

3. A deed from said Terrell, Commissioner, and T. H. Lester, B. D. Lester and C. Y. Lester, of Swain County, North Carolina, to said Loomis and Wheeler, dated the 27th day of December, 1884.

4. A deed dated the 29th day of April, 1907, from the said Loomis and Wheeler, and their respective wives to the defendant, W. C. Heyser.

5. A deed from the said defendant, W. C. Heyser, and his wife, to the defendant, The Brunswick-Balke-Collender Company;

141 the said deeds being the same as those mentioned in the third paragraph of the plaintiff's complaint herein and the first paragraph of his amended complaint herein.

This court ordered that the special case should stand for judgment, and the same standing for judgment in the presence of counsel for plaintiffs and defendants.

Upon reading the said deeds and hearing what was alleged by counsel on both sides in relation thereto, this court doth, as to the first of the questions submitted for the judgment of the court, declare that by virtue of the three first above mentioned deeds under and through which the defendant, The Brunswick-Balke-Collender Company, claims title to the trees in question mentioned and described in said deed, the plaintiff admitting that he and the defendant company claim title from a common source of title and that the plaintiff's deed under which he claims embraced the same lands as the said above three deeds under which the defendant com-

pany claims, and the same trees mentioned and described in said defendant company's deed, the defendant, The Brunswick-Balke-Collender Company, under and by virtue of said three deeds first above mentioned and the said other deeds above mentioned, does take and hold an absolute and indefeasible title, in fee simple, in and to all of the trees mentioned and described in the said deeds and is the owner in fee simple of said trees, and by virtue of the provisions of said deeds, the said defendant, The Brunswick-Balke-Collender Company, its successors and assigns, have the right to enter upon the lands upon which said trees are situated and upon any other lands belonging to the estate of the said William H. Thomas, at the date of the said three deeds first above mentioned, for the purpose of cutting and removing said trees, and have the right of ingress and egress over the same and the right to make such roads over any of said lands suitable and proper to enable them to remove said trees whenever they may so desire.

And this court doth, as to the second of the said questions, declare that under and by virtue of the provisions of the said deeds the defendant, The Brunswick-Balke-Collender Company, its successors and assigns, are not bound by any provisions contained in said deed or otherwise, to cut and remove the said trees from the said lands within a reasonable time.

And this court, as to the said first and second questions, doth order, adjudge and decree accordingly.

And this cause is retained for further orders.

This the 1st day of June, 1909.

J. C. PRITCHARD,
U. S. Circuit Judge.

Indorsed: Decree.

142 *Replication to Amended Bill.*

U. S. Circuit Court. Filed June 7, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States in and for the Western District of North Carolina.

In Equity. No. —.

C. H. REXFORD
vs.
BALKE-COLLANDER COMPANY.

Replication.

This replicant saving and reserving to himself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, Brunswick-Balke-Collander Company to plaintiff's amended bill for replication thereunto saith:

That he doth and will aver, maintain, and prove his said bill to

be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient, in law to be replied unto by this replicant; without that that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all of which matters and things, this replicant is ready to aver, maintain and prove as this Honorable Court shall direct and humbly prays, as in and by his bill he hath already prayed.

J. H. TUCKER,
FRYE & RABY,
ADAMS & ADAMS,
Solicitors for Complainant.

Endorsed: C. H. Rexford vs. Brunswick-Balke-Collander Co. Replication to Answer to Amended Bill.

143 *Motion for Reference.*

U. S. Circuit Court. Filed Aug. 18, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY and W. C. HEYSER, Defendants.

Order of Reference.

To the Honorable the Judge of the Circuit Court of the United States for the Western District of North Carolina:

Comes now the above named complainant and moves the court that this cause be referred to a master to hear the testimony and take proofs of all matters at issue in this cause, not heretofore heard by the court.

ADAMS & ADAMS,
J. H. TUCKER,
Solicitors for Complainant.

Order Appointing Special Master.

U. S. Circuit Court. Filed Aug. 18, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Plaintiff,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY and W. C. HEYSER, Defendants.

Order Appointing Referee.

This cause, coming on to be heard upon the application of complainant for reference thereof, and it appearing to the court that the pleadings in the cause are filed and that the documentary evi-
144 dence pertaining to the title to the trees described in the pleadings filed in this cause has been heard by the court;

And it further appearing to the court there is much other proofs touching the matters in issue necessary to be heard, looking to a final judgment, and it further appearing that a reference should be had;

It is now here ordered that the said cause be, and the same is hereby, referred to A. A. Featherston, Junior, Esq., as Special Master of this court, and he is hereby made a Master in said cause and directed to take proofs of all and singular the issues herein (except the evidence in the cause heretofore heard by this court), especially to take evidence concerning the identity of certain marked trees described in the pleadings, and to report the number and identity of such trees, and to ascertain and report his findings to this court, and that he be and is authorized to discharge his duties as such Master at any convenient place, as he may be advised.

This August 17th, 1909.

J. C. PRITCHARD,
U. S. Circuit Judge.

U. S. Circuit Court. Filed Oct. 7, 1909. W. S. Hyams, Clerk.

Circuit Court of the United States, Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Complainant,
vs.
THE BRUNSWICK-BALKE-COLLANDER COMPANY and W. C. HEYSER, Defendants.

This cause coming on to be heard, on motion of J. H. Merrimon, attorney for the defendants.

It is ordered by the court that the parties plaintiff and defendants

each deposit with the clerk of the court the sum of three hundred dollars ($300.00) for the purpose of securing and paying current costs of the master and stenographer in this litigation, and that each of the parties plaintiff and defendants except W. C. Heyser, who has filed a disclaimer in this cause, be and hereby is required to file bond in the cause in the sum of five thousand dollars
145 ($5,000.00) conditioned to pay all such costs as may be decreed against the party filing such bond.

This cause reserved for further orders of this court.

J. C. PRITCHARD,
United States Circuit Judge.

October 7th, 1909.

Endorsed: Rexford vs. Brunswick-Balke-Collander Co. Order.

Order In Re Master's and Stenographer's Expenses.

U. S. Circuit Court. Filed Oct. 21, 1909. W. S. Hyams, Clerk.

United States Circuit Court for the Western District of North Carolina, Fourth Circuit, at Asheville.

C. H. REXFORD, Plaintiff,
vs.
BRUNSWICK-BALKE-COLLANDER CO. et al.

This cause coming on to be further heard and it appearing from the representations of the Master, A. A. Featherston, Jr., that certain advances should be made to cover the necessary expenses in order to continue the proceedings by said master as heretofore ordered; it is now

Ordered that the clerk be, and he is hereby authorized and directed to pay to the said Master, A. A. Featherston, Jr., the sum of $50.00, and the stenographer, A. L. Diggs, the sum of $75.00, on account of said expense.

This order is made without prejudice to the power of the court to tax the costs against any of the parties by subsequent orders.

Oct. 21, 1909.

J. C. PRITCHARD,
U. S. Circuit Judge.

Endorsed: C. H. Rexford vs. Brunswick-Balke-Collander Co. Order for Master's Expense.

146 *Petition for Appeal.*

U. S. Circuit Court. Filed Nov. 23, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, at Asheville. In Equity.

C. H. REXFORD, Complainant,
vs.
THE BRUNSWICK-BALKE-COLLENDAR COMPANY and W. C. HEYSER, Defendants.

Petition for Appeal.

The above named complainant, C. H. Rexford, conceiving himself to be aggrieved by the judgment and decree made and entered in this cause on the 1st day of June, 1909, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals for the Fourth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fourth Circuit.

This the 17 day of November, 1909.

TUCKER & LEE,
ADAMS & ADAMS,
J. C. MARTIN,
Solicitors for the Complainant.

Order Allowing Appeal.

The foregoing petition for appeal having been this day submitted to the undersigned, the said appeal prayed in this cause is hereby allowed, upon the filing of a bond in the sum of $250.00, approved by this court.

This the 19 day of November, 1909.

J. C. PRITCHARD,
United States Circuit Judge.

147 *Assignment of Errors.*

U. S. Circuit Court. Filed Nov. 23, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, at Asheville. In Equity.

C. H. REXFORD
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY.

Assignment of Errors.

Now, on the 17 day of November, A. D., 1909, came the said complainant, C. H. Rexford, by Tucker & Lee, J. S. Adams and J. C. Martin, his solicitors, and says that the decree and judgment in said cause, signed and entered on the 1st day of June, 1909, is erroneous and against the just rights of the said complainant, and that the decree of the said Circuit Court of the United States is contrary to law and equity for the following reasons:

I.

Because the said United States Circuit Court erred in making and entering the order in said cause dated the 9th day of November, 1908, in which it refused to remand the said cause to the Superior Court for the County of Swain in the State of North Carolina from which court said cause had been removed at the instance of the defendant;

II.

Because the said United States Circuit Court erred in admitting over the objection and exception of the complainant all of that portion of the transcript of record of the proceeding brought in the Probate Court of Jackson County, North Carolina, entitled "In the matter of William H. Thomas, lunatic," subsequent to the order made therein on the 1st day of April, 1885, which portion of said record so objected to was the whole thereof, excepting the first twenty-two (22) pages of Exhibit D offered by the defendant in this cause;

III.

Because the said United States Circuit Court erred in admitting in evidence on the trial of this cause, for the purpose of enabling the defendant to make out its defence, all and every part of the
148 said record of the proceeding in the Probate Court of the County of Jackson and State of North Carolina, entitled "In the matter of William H. Thomas, lunatic," a copy of which proceeding is fully set forth in the record in this cause;

IV.

Because the said United States Circuit Court erred in holding that the Probate Court of the County of Jackson, in the State of North

Carolina, in the proceeding therein pending, entitled "In the matter of William H. Thomas, lunatic," had jurisdiction of the said proceeding and of the property referred to in said proceeding, and had any power or authority to entertain the same or to make any order to sell the property of said lunatic for the purposes set forth in said proceeding;

V.

Because the said United States Circuit Court erred in holding that the property in controversy in this cause was described and embraced in the scope of said special proceeding brought in the Probate Court of Jackson County hereinabove referred to;

VI.

Because the said United States Circuit Court erred in holding that said proceeding complied with the statutes of North Carolina in regard to the sale of the real estate of a lunatic and in holding that the order of the Probate Court in said proceeding particularly specified the property to be sold and the terms of sale of said property, and in holding that said alleged sale conveyed the interest of the said lunatic in the property in dispute in this cause, and in holding that the said sale was duly confirmed by the probate judge, as required by the statutes of North Carolina;

VII.

Because the said United States Circuit Court erred in holding that the decree of sale made by the Probate Judge in said proceeding pending in the County of Jackson and State of North Carolina, entitled "In the matter of William H. Thomas, lunatic," authorized the commissioner appointed therein, James W. Terrell, to sell and convey the trees in controversy in this suit, and erred in holding that any sale made of said trees was valid and binding without the same having been duly reported to the court and the sale duly confirmed, as required by the statutes of North Carolina;

149 VIII.

Because the said United States Circuit Court erred in holding that in said proceeding in the Probate Court of the County of Jackson and State of North Carolina, entitled "In the matter of William H. Thomas, lunatic," the whole or any part thereof was sufficient and adequate in law to authorize the commissioner appointed in said proceeding to make or execute any deed of conveyance or other paper-writing which would have the effect to convey the interest of said lunatic in the standing timber on his land, or any part thereof, or in the standing timber on the land described in the bill of complaint in this cause and in controversy in this suit;

IX.

Because the United States Circuit Court erred in holding that the said proceeding in the Probate Court of Jackson County, North

Carolina, entitled "In the matter of William H. Thomas, lunatic," authorized the said commissioner appointed therein to sell and convey the trees and property in controversy in this cause without making and filing a report in this cause, showing what particular trees were sold or what particular property or interest therein had been disposed of, describing the same specifically as required by the statutes of North Carolina, and without having the same duly confirmed by the court;

X.

Because the said United States Circuit Court erred in holding that the said proceeding brought in the Probate Court of Jackson County, North Carolina, entitled "In the matter of William H. Thomas, lunatic," constituted notice to the complainant in this cause and those under whom he claims title, or that said proceeding affected in any way or manner the title to the property in controversy in this cause;

XI.

Because the said United States Circuit Court erred in holding that the property in this cause was sufficiently described in the petition filed in said proceeding in the Probate Court of the County of Jackson and State of North Carolina, entitled, "In the matter of William H. Thomas, lunatic."

XII.

Because the said United States Circuit Court erred in holding that the property in controversy in this suit was sufficiently described or embraced in the Order of Sale purporting to have been made
150 in said proceeding pending in the Probate Court of Jackson County, North Carolina, entitled "In the matter of William H. Thomas, lunatic."

XIII.

Because the said United States Circuit Court erred in holding that the report of the alleged sale of trees in said proceeding in the Probate Court of Jackson County, North Carolina, entitled "In the matter of William H. Thomas, lunatic," was sufficient in law and complied with the statutes of North Carolina;

XIV.

Because the said United States Circuit Court erred in holding that the said alleged sale of said trees by the commissioner appointed in said proceeding pending in the Probate Court for the County of Jackson and State of North Carolina, entitled "In the matter of William H. Thomas, lunatic," was duly confirmed by the court, as required by the statutes of North Carolina;

XV.

Because the said United States Circuit Court erred in holding that the proceeding in the Superior Court of Jackson County, North

Carolina, commenced by the filing of a petition therein, dated the 31st day of December, 1898, entitled "In the matter of William H. Thomas, lunatic," and the subsequent proceeding in said cause in which there was a reference and report of referees, and a confirmation of the report of referees, which proceeding pended from the date of filing of said petition until the October Term, 1905, of the said Superior Court of Jackson County, at which time the report of the referees appointed in said cause was approved and confirmed, in any way or manner affected the title of the complainant to the property in controversy therein or was binding on him or those under whom he claims, because neither the complainant nor those under whom he claims title were parties to said proceeding, nor did the said proceeding purport, as a reading of the petition in said proceeding will show, to effect or cover any of the property in controversy in this suit;

XVI.

Because the said United States Circuit Court erred in holding that said petition filed in said Proceeding in the Superior Court of Jackson County, North Carolina, entitled "In the matter of Wil-
151 liam H. Thomas, lunatic," dated the 31st day of December, 1898, embraced or referred to any of the property in controversy in this cause, or in any other way or manner gave the court jurisdiction to make any order affecting the title in controversy in this suit;

XVII.

Because the said United States Circuit Court erred in holding that the proceedings in the Superior Court of Jackson County, North Carolina, entitled "In the matter of William H. Thomas, lunatic," including the petition filed therein dated the 31st day of December, 1898, and subsequent thereto, had the effect to ratify and confirm the alleged sale of the property in controversy, and vest the title thereto in the defendant, or those under whom it claims, because said proceeding, as appears from the said petition, was brought and conducted only for the purpose of compelling a settlement by the commissioner, James W. Terrell, of the funds which had been paid into his hands as commissioner appointed, to sell the property of said lunatic.

XVIII.

Because the said United States Circuit Court erred in holding that the order of confirmation of the report of the referees made and filed in said proceeding pending in the Superior Court of Jackson County, North Carolina, entitled "In the matter of William H. Thomas, lunatic," which said report was dated the 26th day of February, 1905, and which said order or confirmation was dated October Term, 1905, were binding on the complainant herein, and those under whom he claims title to the property in controversy in this suit; because the complainant's title to the property in controversy in this suit was in no way involved in said proceeding pending in the Su-

perior Court of Jackson County, and neither the complainant nor those under whom he claims had any notice that such title was involved;

XIX.

Because the said United States Circuit Court erred in holding that the complainant was not the owner of the trees and property in controversy in this suit and was not entitled to the injunction prayed for in this suit;

XX.

Because the said United States Circuit Court erred in holding that said special proceeding or proceedings brought and pending in the Probate Court and in the Superior Court of the County of
152 Jackson, in the State of North Carolina, entitled "In the matter of William T. Thomas, lunatic," were sufficient to authorize the commissioner, James W. Terrell, appointed in said proceeding, to convey to the defendant, or those under whom it claims, the trees in controversy in this suit;

XXI.

Because the said United States Circuit Court erred in holding that the deed of conveyance introduced by the defendant, purporting to have been executed by James W. Terrell, commissioner, to J. F. Loomis and Zenephon Wheeler, dated the 3rd day of August, 1883, and the deed from said Terrell, commissioner, to said Loomis and Wheeler, dated the 27th day of December, 1884, and the deed from said Terrell, commissioner, and T. H. Lester, D. B. Lester and C. Y. Lester, to said Loomis and Wheeler, dated the 27th day of December, 1884, conveyed to those under whom the defendant claims title an absolute estate in fee simple in the trees in controversy in this suit, or conveyed any other estate in said trees;

XXII.

Because the said United States Circuit Court erred in holding that the defendant, by virtue of the deed of conveyance introduced by the defendant, dated the 29th day of April, 1907, and executed by J. F. Loomis and Zenephon Wheeler, and their respective wives, to W. C. Heyser and by virtue of a deed from W. C. Heyser to the defendant, which deed was introduced in evidence, became the owner in fee simple of the trees in controversy in this suit.

XXIII.

Because the said United States Circuit Court erred in holding that the defendant, by virtue of any or all of the deeds of conveyance and proceedings introduced by the defendant in this cause, became the owner of the trees mentioned and described in the complaint in this cause, with the indefeasible title thereto, or became entitled to any right or estate or interest in said trees;

XXIV.

Because the said United States Circuit Court erred in holding that said conveyances, if they had any effect at all, gave to the defendant and those under whom it claims anything more than the right to remove the trees in controversy in this suit from the lands on
153 which they grew within a reasonable time and that their failure to remove the same during a period of more than twenty-three (23) years was not laches on their part and an abandonment of any right or property they may ever have had in the same.

XXV.

Because the said United States Circuit Court erred in finding the facts set forth in the decree herein, dated June 1st, 1909, and in the conclusions of law mentioned in said decree, to the effect that the defendant was the owner of the property in controversy in this suit, and that the complainant had no right or title thereto, and was not entitled to the injunction sued for in this cause;

XXVI.

Because the said United States Circuit Court erred in holding that the proceeding, a certified copy of which was introduced by the complainant on the trial of this cause, brought in the Superior Court of Jackson County, North Carolina, by James R. Thomas, Guardian of William H. Thomas, Love Thomas, De Witt Thomas, Mariah Thomas, and Bryan Thomas, infants under twenty-one (21) years of age, and children of W. H. Thomas, Junior, deceased, for the purpose of selling the lands of said monors, as set forth in said petition filed in said cause, dated the 15th day of April, 1903, and the orders and proceedings therein did not vest in J. S. Bailey, under whom the complainant claims title to the property in controversy in this suit, a perfect and absolute title to said property in controversy in this suit.

XXVII.

Because the said United States Circuit Court erred in holding that the complainant was not the owner of the property in controversy in this suit by virtue of the proceeding mentioned in the last numbered assignment of error, and by virtue of the deeds of conveyance introduced by the complainant, one of which was executed by J. R. Thomas and wife, and others, to J. S. Bailey, dated the 18th day of April, 1903, and the other by J. S. Bailey to the complainant herein, dated the 26th day of September, 1906, all of which were introduced by the complainant on the trial of this cause.

XXVIII.

Because the said United States Circuit Court erred in rendering judgment and entering a decree herein to the effect that the
154 defendant was the owner of all the trees described and re-

ferred to in the several deeds of conveyances under which defendant claimed the same.

TUCKER & LEE,
ADAMS & ADAMS,
J. C. MARTIN,
Solicitors for Complainant.

Appeal Bond.

U. S. Circuit Court. Filed Nov. 23, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, at Asheville. In Equity.

C. H. REXFORD, Complainant,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Defendant.

Appeal Bond.

Know all men by these presents, that we, C. H. Rexford, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto The Brunswick-Balke-Collender Company, defendant, in the above cause, in the full and just sum of two hundred and fifty dollars ($250) to be paid to the said The Brunswick-Balke-Collender Company, its certain attorney, or successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

Sealed with our seals and dated this the 17th day of November in the year of our Lord one thousand nine hundred and nine.

Whereas, lately, in the Circuit Court of the United States for the Western District of North Carolina, in a suit pending in said court between said C. H. Rexford as complainant and the said The Brunswick-Balke-Collender Company as defendant, a judgment and decree was rendered against the said named complainant, and the said named complainant having obtained an appeal to reverse
155 the said judgment and decree in the aforesaid suit and a citation directed to the said The Brunswick-Balke-Collender Company sitting and admonishing it to be and appear at the United States Circuit Court of Appeals for the Fourth Circuit, to be holden in Richmond in the State of Virginia, on the day in said citation mentioned;

Now, the condition of the above obligation is such that if the said C. H. Rexford shall prosecute his said appeal to effect and answer all damages and costs, if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

C. H. REXFORD, [SEAL.]
By TUCKER & LEE, *Att'ys.*
AMERICAN SURETY COMPANY OF NEW YORK, [SEAL.]
By JAMES P. SAWYER,
Res. Vice-Pres't.

Attest:
[SEAL.] JULIUS C. MARTIN,
Res. Ass't Sec.

The foregoing appeal bond having been this day submitted to the undersigned, the same is hereby approved.

This the 19th day of November, 1909.

J. C. PRITCHARD,
United States Circuit Judge.

Stipulation of Counsel.

U. S. Circuit Court. Filed Nov. 30, 1909. W. S. Hyams, Clerk.

In the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

In Equity.

C. H. REXFORD
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY.

Stipulation of Counsel.

It is hereby agreed between counsel for the complainant and for the defendant in the above entitled cause, that the Clerk of the United States Circuit Court shall omit from the transcript
156 of record on the appeal of the complainant to the United States Circuit Court of Appeals from the decree rendered by Judge Pritchard, on the 1st day of June, 1909, the following portion of said record, to-wit:

(1) The affidavit of W. A. Rexford, dated June 9, 1908;
(2) Restraining order of Judge of Superior Court, signed by Judge Peebles, dated June 9, 1908;
(3) Injunction bond, dated June 10, 1908;
(4) Restraining order issued by Clerk of Superior Court, dated June 10, 1908;
(5) Duplicate restraining order issued by Clerk of the Superior Court, dated June 10, 1908;
(6) Order of Judge Peebles, dated June 9, 1908;
(7) Duplicate of affidavit of W. A. Rexford, dated June 9, 1908;
(8) Agreement of counsel, dated June 18, 1908;
(9) Order of Judge Ferguson, dated June 10, 1908;
(10) Order of Judge Peebles and Clerk, dated June 17, 1908;
(11) Plaintiff's undertaking *in* injunction, dated June 17, 1908;
(12) Affidavit of J. E. Coburn, dated July 10, 1908;
(13) Affidavit of N. J. Patton, dated July 11, 1908;
(14) Affidavit of N. P. Abbott, dated July 13, 1908;
(15) Affidavit of J. F. Teague, dated July 13, 1908;
(16) Affidavit of W. T. Mason, dated July 8, 1908;
(17) Affidavit of A. H. Hayner, dated July 8, 1908;
(18) Affidavit of James W. Terrell, dated July 13, 1908;
157 (19) Affidavit of E. C. Monteith, dated July 8, 1908;
(20) Affidavit of A. V. Colhoun, dated June 30, 1908;

(21) Affidavit of O. P. Williams and J. B. Carrington, dated July 9, 1909;
(22) Affidavit of W. C. Heyser, dated July 14, 1908;
(23) Affidavit of J. B. Carrington, T. V. Shope and O. P. Williams, dated June 24, 1908;
(24) Affidavit of J. E. Coburn, dated June 22, 1908;
(25) Unsigned copy of replication of plaintiff, filed April 1, 1909.

Agreed clerk need send only one copy of Exhibits—E. F. G. H. I. H. and only one copy of Record in matter of W. H. ——, Lunatic,
This the 30th day of November, 1909.

TUCKER & LEE,
J. C. MARTIN,
Counsel for Complainant.
JAMES H. MERRIMON,
As Counsel for Defendant.

Citation.

U. S. Circuit Court. Filed Nov. 23, 1909. W. S. Hyams, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to The Brunswick-Balke-Collender Company, appellee, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 18th day of December next, pursuant to an appeal from a decree of the United States Circuit Court of the Western District of North Carolina in your favor passed in a
158 cause in said court wherein C. H. Rexford is complainant and you are defendant to show cause, if any there be, why the decree rendered against the said C. H. Rexford in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 19th day of November in the year of our Lord one thousand nine hundred and nine.

J. C. PRITCHARD,
U. S. Circuit Judge.

Service of the within citation is hereby accepted and the delivery of a copy thereof admitted this Nov. 24th, 1909.

JAMES H. MERRIMON,
Solicitor for Defendant.

Order to Transmit Record.

And, thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid together with all things thereunto relating, be transferred to the said United States

Circuit Court of Appeals, for the Fourth Circuit and the same is transmitted accordingly.

Teste:

W. S. HYAMS, *Clerk.*

Clerk's Certificate.

I, W. S. Hyams, Clerk of the Circuit Court of the United States for the Western District of North Carolina, certify that the foregoing is a true, full and complete transcript of the record and proceedings in the cause of C. H. Rexford against The Brunswick Balke Collander Company, and W. C. Heyser, made up in accordance with the stipulation of counsel incorporated therein in the herein entitled cause, as fully as the same remains on file and of record in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at office in the City of Asheville, North Carolina, on this December 6th, A. D. 1909.

[SEAL OF COURT.]

W. S. HYAMS,
Clerk U. S. Circuit Court.

159 & 160 *Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.*

No. 496.

C. H. REXFORD, Appellant,
versus
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

December 10, 1909.—Transcript of record is filed and cause docketed.

Same day appearance of J. H. Tucker, Julius C. Martin and John S. Adams, for appellant, is entered, order filed.

December 14, 1909.—Appearance of James H. Merrimon and T. D. Bryson for the appellee is entered, order filed.

December 29, 1909.—Twenty copies of the printed record are filed.

161 & 162 February 18, 1910 (February Term, 1910).—Cause come on to be heard before Goff, Circuit Judge, and Boyd and Dayton, District Judges, and is argued by counsel and submitted.

July 13, 1910 (May Term, 1910).—The Court announced and filed its memorandum opinion, which is as follows, to wit:

United States Circuit Court of Appeals, Fourth Circuit.

No. 946.

C. H. REXFORD, Appellant,
versus
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Argued Feb. 18, 1910. Decided July 13, 1910.

Before Goff, Circuit Judge, and Boyd and Dayton, District Judges.

Julius C. Martin and J. H. Tucker (Jno. S. Adams, and Martin & Wright on the brief) for the appellant, and James H. Merrimon and T. D. Bryson (Bryson & Black on the brief) for the appellee.

Opinion by Judge Boyd.

(To be Filed Hereafter.)

Affirmed.

163 & 164 July 14, 1910 (same Term), the Court made and entered the following decree, to-wit:—

Decree.

Filed and Entered July 14, 1910.

United States Circuit Court of Appeals, Fourth Circuit.

No. 946.

C. H. REXFORD, Appellant,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby affirmed, with costs.

July 14th, 1910.

NATHAN GOFF.

165 & 166 *Order Staying Mandate.*

Filed July 28, 1910.

United States Circuit Court of Appeals, Fourth Circuit.

No. 946.

C. H. REXFORD, Appellant,
vs.
BRUNSWICK-BALKE-COLLENDER CO., Appellee.

For reasons appearing to the court, it is ordered that the mandate in this cause be withheld until hereafter, when by order it shall be directed to be sent to the court below.

NATHAN GOFF,
Judge Presiding.

September 8, 1910, the Court filed the following opinion, to-wit:—

Opinion.

Filed September 8, 1910.

167 United States Circuit Court of Appeals, Fourth Circuit.

No. 946.

C. H. REXFORD, Appellant,
versus
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

[Argued February 18, 1910. Decided July 13, 1910.]

Before Goff, Circuit Judge; Boyd and Dayton, District Judges.

Julius C. Martin and J. H. Tucker (Jno. S. Adams, and Martin & Wright on the brief) for appellant, and James H. Merrimon, and T. D. Bryson (Bryson & Black on the brief) for appellee.

Statement.

This action was brought originally in the Superior Court of Swain County, North Carolina, to the July term, 1908, of said court. Upon due proceedings had, the case was removed for trial to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

In his complaint filed in the State court the plaintiff seeks to

have declared null and void certain deeds executed by John
168 W. Terrell, Commissioner, to sell the lands of William H. Thomas, a lunatic, which deeds are recorded in the Counties of Swain and Graham, North Carolina, and under which the defendant claims title to certain trees and timber standing upon the land, of which plaintiff alleges he is the owner in fee simple.

After the case was docketed in the Circuit Court, by leave of the court, the plaintiff changed the form of his action and filed a bill in equity to remove a cloud from his title to the land in controversy. The bill sought, as did the complaint filed in the State court, to have cancelled certain deeds made by Terrell, Commissioner, to J. F. Loomis and Xenaphon Wheeler, and from Loomis & Wheeler to W. C. Heyser, and from Heyser to the Brunswick-Balke-Collender Company, the present defendant, which deeds purport to convey a certain number of trees of a particular size growing and standing upon the lands claimed by complainant, and by the cancellation and annulment of these deeds it was sought to remove the alleged cloud upon his title to the land described.

Heyser filed an answer disclaiming interest in the controversy, but the answer of the present defendant maintained the validity of the deeds under which it held its right to the trees conveyed thereby; and further averred that the trees were still standing upon the land, and had not been cut and removed. In this situation the following order was made in the case on the 15th of April, 1909:

"The above entitled cause, coming on to be heard on application of the complainant for the appointment of a Special Examiner to take testimony therein under Equity Rule 67;

"And it appearing to the court that the rights of the defendants in this action depends primarily on several questions of law based on documentary evidence of its title to the trees in question;

"And it further appearing to the court that it would facilitate the hearing of said cause, if such documentary evidence were offered and such preliminary question to the title first disposed of by the court.

"Now therefore it is ordered that these questions of law and the documentary evidence bearing thereon be first presented to the court for argument and all questions of fact in this cause be held in abeyance until said preliminary questions are disposed of by the court. And it is further ordered that this cause be and the same is set for hearing before the court on said questions on the 28th day of April, A. D., 1909, time 3 p. m. o'clock at Asheville, North Carolina.

169 "This order is made without prejudice to the rights of either party in case the court is of the opinion that it is necessary that further evidence be taken in said cause.

"April 15th, 1909.

"J. C. PRITCHARD,
"U. S. Circuit Judge."

Thereupon, without the intervention of a Master the court proceeded to take testimony, and on the 1st day of June, 1909, entered the following decree:

"This cause came on the 28th day of April, 1909, to be heard and debated before the Honorable J. C. Pritchard, Circuit Judge of the United States for the Fourth Circuit, in the presence of counsel learned for plaintiff and defendant, the Brunswick-Balke-Collender Company, upon debate of the matter, and hearing what was alleged by counsel on both sides in relation to the issues raised by the pleadings touching the validity and construction of certain deeds of conveyance for certain timber trees:

"1. A deed from James W. Terrell, Commissioner, to J. F. Loomis and Xenophon Wheeler, dated the 3rd day of August, 1883.

"2. A deed from the said Terrell, Commissioner, to the said Loomis & Wheeler, dated the 27th day of December, 1884.

"3. A deed from said Terrell, Commissioner, and T. H. Lester, B. D. Lester and C. Y. Lester, of Swain County, North Carolina, to said Loomis & Wheeler, dated the 27th day of December, 1884.

"4. A deed dated the 29th day of April, 1909, from the said Loomis & Wheeler, and their respective wives to the defendant W. C. Heyser.

"5. A deed from the said defendant, W. C. Heyser, and his wife to the defendant, The Brunswick-Balke-Collender Company; the said deeds being the same as those mentioned in the third paragraph of the plaintiff's complaint herein and the first paragraph of his amended complaint herein.

"This court ordered that the special case should stand for judgment, and the same standing for judgment in the presence of counsel for plaintiffs and defendants,

170 "Upon reading the said deeds and hearing what was alleged by counsel on both sides in relation thereto, this court doth, as to the first of the questions submitted for the judgment of the court, declare that by virtue of the three first above mentioned deeds under and through which the defendant, The Brunswick-Balke-Collender Company, claims title to the trees in question mentioned and described in said deed, the plaintiff admitting that he and the defendant company claim title from a common source of title and that the plaintiff's deed under which he claims embraced the same lands as the said above three deeds under which the defendant company claims, and the same trees mentioned and described in said company's deed, the defendant, The Brunswick-Balke-Collender Company, under and by virtue of said three deeds first above mentioned and the said other deeds above mentioned, does take and hold an absolute and indefeasible title, in fee simple, in and to all of the trees mentioned and described in the said deeds and is the owner in fee simple of said trees, and by virtue of the provisions of said deeds, the said defendant, The Brunswick-Balke-Collender Company, its successors and assigns, have the right to enter upon the lands upon which the said trees are situated and upon any other lands belonging to the estate of the said William H. Thomas at the date of the said three deeds first above mentioned, for the purpose of cutting and removing said trees, and have the right of ingress and egress over the same and the right to make such roads over any of said lands suitable and proper to enable them to remove said trees whenever they may so desire.

"And this court doth, as to the second of the said questions, declare that under and by virtue of the provisions of the said deeds the defendant, The Brunswick-Balke-Collender Company, its successors and assigns, are not bound by any provisions contained in said deed or otherwise, to cut and remove the said trees from the said lands within a reasonable time.

"And this court, as to the said first and second questions, doth order, adjudge and decree accordingly.

"And this cause is retained for further orders.

"This the 1st day of June, 1909.

"J. C. PRITCHARD,
"U. S. Circuit Judge."

From this decree the complainant appealed to this court.

171 BOYD, *District Judge:*

There are many assignments of error on the part of the appellant set out in the record, but the whole case as presented to us, in our opinion, turns upon the effect to be given to the three deeds referred to in the decree, one dated August 3rd, 1883, and the other two December 27th, 1884, in which J. W. Terrell, as Commissioner, appointed by the Probate Court of Jackson County, conveyed to J. F. Loomis and Xenophon Wheeler certain trees therein described upon the lands of William H. Thomas, Sr., in the Counties of Graham and Swain, North Carolina. The timber rights conveyed in the said deeds are those now claimed by defendant by deeds subsequently made by Loomis & Wheeler to W. C. Heyser, and by Heyser to the defendant. If the original deeds from Terrell to Loomis & Wheeler are, for any reason, invalid, it is admitted that the claim of the defendant under the deeds subsequently made, constitutes a cloud upon appellant's title, otherwise, not.

The several points involved rest chiefly upon certain proceedings had in the Probate Court of Jackson County, North Carolina, before the Clerk of the Superior Court, and the Superior Court of said county, and in order to an intelligent understanding of the case it will be necessary in the course of our discussion to give the character and substance of these proceedings, and as near as possible, the order in which they took place.

William H. Thomas, Sr., was a resident of Jackson County, North Carolina. He was a man of extensive business affairs and the owner of considerable property, consisting principally, however, of large tracts of wild unimproved lands, upon much of which there was valuable timber in the counties of Jackson, Cherokee, Graham, Swain, and elsewhere, in the Western part of the State.

Before the inquisition hereafter referred to in which the said Thomas was adjudged a lunatic, he was largely indebted to various persons, and certain of his creditors had reduced their claims against him to judgment in the State courts, and besides William Johnson and R. B. Johnson had obtained judgment against him in the Circuit Court of the United States for the Western District of North Carolina for about the sum of $34,000.00. Whilst these conditions

were existing, the mind of Thomas became impaired, and upon due proceedings had, before the Probate Court of Jackson County, on the 15th of May, 1877, he was adjudged a lunatic, and on the
172 5th of April, 1878, W. L. Hilliard was duly appointed and qualified as his guardian.

In May, 1880, Hilliard, as guardian, filed his petition in the Probate Court of Jackson County by which he sought to provide a maintenance for the lunatic, and for his family, also to raise funds for expenses necessarily incident to important litigation pending in regard to lands of the lunatic, and to pay taxes, and further in the petition he asked for an adjustment and settlement of certain judgments which had been taken against Thomas before he was declared insane, and for the payment of his debts. It was also stated in the petition that the lunatic had no personal estate of any value.

Acting on the petition, the Probate Judge made certain findings of fact in regard to the matters set out, and among them that the amount necessary for a maintenance for the lunatic and his family was $1,000.00 a year, and also that there had already accrued for the support of the lunatic and his family, and for necessary expenses incident to litigation attending his estate, and taxes, the sum of $2,450.00. Thereupon, the order of the court was that there be set apart for the support of the lunatic and his family, and other expenses necessarily incident to the estate, the sum of $2,200.00, each, for two years, $1,900.00 each, for the two succeeding years, and $1,600.00 for the next year.

Proceeding further in the ascertainment of facts, the Probate Court found that the estate of the lunatic was indebted; that Johnson and Johnson had recovered a judgment against him in the Circuit Court of the United States for the Western District of North Carolina for about $34,000.00, and that there were judgments docketed against him in the State Courts aggregating about $16,000.00. Futher, that the Johnson judgment was a lien on about 40,000 acres of unimproved land located in the counties mentioned, which land was worth from fifty cents to two dollars an acre; that the larger and more valuable tracts of land belonging to said Thomas were involved in serious litigation, requiring large amounts of money for costs, fees, attention, etc.; that William H. Thomas, Jr., of full age, James R. Thomas, age 19, and Sallie L. Thomas, age 17, were the children and presumptive heirs at law, and next of kin of the lunatic, and that the two minor children were a part of his family.

Thereupon, on the 26th of May, 1880, the Probate Court entered a decree in response to the prayer of the guardian's petition by which James W. Terrell was appointed commissioner to make sale of lands belonging to the lunatic's estate, being directed to
173 sell first such as were not subject to the lien of the Johnson judgment recovered in the Circuit Court of the United States, as before stated. The Commissioner was empowered to sell lands at private sale for one-fourth cash, and the balance in equal installments in one and two years, and he was also required to report semi-annually to the court of sales made, to whom sold, the particular tract sold, date of sale and amount received. Terrell pro-

ceeded as Commissioner to discharge the duties imposed upon him by decree of the Probate Court, and on the first of April, 1885, he made his report in which, among other realty, was included the sales of trees in 1883 and 1884 to Loomis & Wheeler, and which were conveyed to them by the deeds in question, and this report was confirmed by the clerk of the Superior Court of Jackson County.

As will be seen, the proceedings by the guardian were commenced in the Probate Court of Jackson County, and the findings of fact and the decree appointing Terrell Commissioner with authority to sell the lands made by that court, in 1880, but that the report of the Commissioner was made to the clerk of the Superior Court of Jackson County, and confirmed by that officer, in 1885. This is due to the fact that in the meantime the laws of North Carolina with respect to Probate Courts, and the clerks of the Superior Courts, had been changed. The law as it existed when the proceedings began will be found in Battle's Revisal. We quote the following from Chapter 90:

"The Clerks of the Superior Courts are declared Judges of Probate in their respective counties."

And as relating to the jurisdiction of the Probate Court at the time, we copy Section 7, Chapter 57, of said Revisal:

"Whenever it shall appear to the Court of Probate, upon the petition of the guardian of any idiot or lunatic, that a sale of any part of his real or personal estate is necessary for his maintenance, or for the discharge of debts unavoidably incurred for his maintenance; or, whenever the court shall be satisfied that the interest of the idiot or lunatic would be materially and essentially promoted by the sale of any part of such estate, or whenever any part of his real estate is required for public purposes, the court may order a sale thereof to be made by such person, in such a way and on such terms as it shall adjudge; provided, however, that the court, if it be deemed proper, may direct to be made parties to such petition the next of
174 kin or presumptive heirs of such nonsane person. And if on the hearing, the court shall order such sale, the same shall be made and the proceeds applied and secured, shall descend and be distributed, in like manner as is provided for the sale of infants' estates, decreed in like cases to be sold on application of their guardians, as directed in the chapter entitled "Guardian and Ward."

The Probate Courts, by that name, were abolished by the North Carolina Legislature as will be seen by reference to the Code of North Carolina adopted in 1883, Vol. 1, Sec. 102, with is in this language:

"The office or place of probate judge is abolished, and the duties heretofore pertaining to clerks of the superior courts as judges of probate, shall be performed by the clerks of the superior courts as clerks of said courts, and all matters pending before said judges of probate shall be deemed transferred to the clerks of the superior court."

And further, Section 7, copied above, was re-enacted verbatim as section 1675 of the Code of 1883, and the same jurisdiction with respect to lunatics and their estates was thereby conferred on the clerks of the Superior Courts.

The appellant insists that under the circumstances detailed the Probate Court had no jurisdiction to entertain the guardian's petition, or to order sales of the lunatic's property, and that, therefore, the proceedings had in that court were void, and the deeds to Loomis & Wheeler by virtue thereof are invalid. This is the first question for our consideration.

In the case of Blake v. Respass, 77 N. C., 189, the Supreme Court of the State of North Carolina held that:

"The statute, Battle's Rev. (chapter 57) confers no power upon the courts of probate to provide for the payment of the debts of a lunatic contracted prior to the lunacy."

If, therefore, the petition of the guardian had been solely to provide for the payment of pre-existing debts, except such as were unavoidably incurred for the maintenance of the lunatic, there would have been no jurisdiction in the court to entertain the petition, or respond to its prayers by ordering sales of the lunatic's property, and that would be an end of this case, but as we see it the provision
for the payment of debts of the lunatic was a secondary object
175 of the petition, the prime purpose being to provide for a maintenance for the lunatic and his family; for debts theretofore unavoidably incurred for support, and also for current expenses incident to the care and preservation of his estate. By the averments in the petition it is made to appear that the lunatic's poperty was encumbered, was in litigation, and that the income therefrom had not been sufficient to meet the expenses incident to his support, and it is specifically stated:

"That there is yet due and owing on account of the support of the said lunatic and the maintenance and support of said infant children and costs accruing in litigation in the protection of said lunatic's property the sum of two thousand dollars."

And among the first prayers of the petition are the following:

"That an account may be taken to inquire and ascertain of what the estate of the said W. H. Thomas consisted at the inquisition of the said lunacy."

"Of what the said estate does now consist?"

"That a proper sum may be appropriated and settled for the maintenance and support of the said lunatic: for indebtedness already incurred and for the support and maintenance for the future."

"And that a proper sum may be settled and approved for the maintenance and support of the said infant children, in the future, as well as the indebtedness of the past, and that the said sum so reported as necessary for the maintenance and support of the said lunatic may be paid to his guardian out of the estate of the said lunatic, and that the sum so settled and approved for the support and maintenance of the said infant children be paid to the guardian of said children out of said lunatic's estate."

Undoubtedly the Probate Court had jurisdiction of a petition for the allotment of a maintenance for a lunatic and his family, to discharge debts unavoidably incurred for this purpose, and to direct sales of property to these ends, and further, we think that a proper construction of the statute vested the power in the Probate Court

to make necessary and suitable provisions for the care and preservation of the lunatic's estate.

In our research we find no North Carolina case to the effect that the Probate Court had no jurisdiction over the estate of a lunatic further than to provide for maintenance. The decisions have
170 only gone to the extent that the Probate Court was not authorized to provide for the payment of debts of a lunatic contracted prior to the lunacy; that this jurisdiction remained in the Superior Court where it had always been.

In Section 7 of Chapter 57, Battle's Revisal, copied above, it will be found that the Probate Court, upon the petition of the guardian of a lunatic, had the jurisdiction to direct the sales of real or personal estate of the lunatic for four purposes; first, for the necessary maintenance; second, for the discharge of debts unavoidably incurred for maintenance; third, whenever the courts shall be satisfied that the interest of the lunatic would be materially and essentially promoted by the sale of any part of his estate; and fourth, whenever any part of his real estate was required for public purposes.

The Probate Court found as a fact that the most valuable real estate of the lunatic was in litigation, and that there were necessary costs and expenses attending this litigation which involved the recovery and preservation of the property, also that taxes were accruing upon the lands, and that the lands did not yield enough income to pay such taxes.

We are, therefore, led to inquire the meaning of the statute wherein it says that the court shall have power to order the sale of any part of the real or personal estate of a lunatic whenever the court shall be satisfied that the interest of the lunatic would be materially and essentially promoted thereby. In view of this provision will it be contended that the court having both the person and the estate of a lunatic legally in its custody is to sit idly by and see such estate subjected to loss or swept away by litigation for the want of jurisdiction to take steps for its preservation? To give the statute a construction leading to such result, would, to our minds, be subversive of legislative intent, and would expose the estate of a lunatic in custodia legis to loss, and perhaps entire sacrifice without power in the court having it in charge to protect it.

We conclude, therefore, that the allegations of the petition of the guardian were sufficient to confer jurisdiction upon the Probate Court to ascertain the necessary maintenance for the lunatic and his family to be allotted out of his estate, to provide for debts theretofore unavoidably incurred for such maintenance and also to make such orders and decrees as were necessary to preserve the estate, or to save it from loss or dissipation pending the lunacy, and the fact that in the petition the guardian went further and asked for sales of property of the lunatic to relieve liens, and to pay pre-existing debts did not oust the jurisdiction of the Probate Court to proceed
177 with the cause for the purposes contemplated by section 7, chapter 57, above quoted, and to the extent authorized by the law.

be corrected or examined when brought up collaterally as they were in the Circuit Court."

We find also that in the case of Comstock v. Crawford, 3 Wallace, 70 U. S., 396, in which the court was treating of the action of a Probate Court in a proceeding to sell land by an administrator, it is held:

"But when by the presentation of a case within the statute, the jurisdiction of the court has once attached, the regularities or irregularities of subsequent steps can only be questioned in some direct mode as prescribed by law. They are not matters for which the decree of the court can be collaterally assailed."

And to the same effect is the decision in the case of McNitt v. Turner, 16 Wallace, 80 U. S., 352:

"Where jurisdiction has attached, whatever errors may occur subsequently in its exercise, the proceedings being coram judice, cannot be impeached collaterally except for fraud."

A more recent case of Haines v. Davis, 104 U. S., 356, treats generally of this subject, and reaffirms the decisions we have cited above, and refers to a number of leading authorities in support of the principle.

Among the earlier cases in which the principle is decided is Elliott v. Peirsol, 1 Peters, 26 U. S., 328, in which the court holds that:

"Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise its judgment, until reversed, is regarded as binding in every other court."

179 However, if after the jurisdiction attached there were irregularities in the course of the cause, or if the court acted in excess of its powers, what, if any, effect would such proceedings have upon the rights of a purchaser at a sale directed by the court's decree? The Probate Judge was, by the laws of North Carolina, a court as is also the clerk of the Superior Court who succeeded to the jurisdiction, and sales under orders or decrees of either were judicial sales. In Thompson v. Tolmie, supra, Mr. Justice Thompson in delivering the opinion of the court cited with approval Perkins v. Fairfield, 11 Mass., 227, in which it was held:

"That a title under sale by administrators, by virtue of a license from the court of common pleas, was good against the heirs of the intestate, although the license was granted upon the certificate of a judge of probates, not authorized by the circumstances of the case. The court said, the license was granted by a court having jurisdiction of the subject. If that jurisdiction was improvidently exercised, or in a manner not warranted by the evidence before the probate court, yet it is not to be corrected at the expense of the purchaser; who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction."

And in McNitt v. Turner, supra, the court says that:

"A purchaser at a judicial sale by an administrator does not depend upon a return by the administrator making the sale of what

has been done. If preliminary proceedings are correct, and he has order of sale and the deed, this is sufficient for him."

And in this same case, Mr. Justice Swayne, after discussing the points involved in the case, which related to a proceeding by an administrator in the State of Illinois to sell lands of a decedent for assets, and deciding that although there were irregularities the court which ordered the sale had jurisdiction, and laying down the rule which we have before referred to that when jurisdiction has attached whatever errors may subsequently occur in its exercise cannot be impeached collaterally save for fraud, proceeds further to say that the order of sale before the court was within the rule, and then quotes from Grignon's Lessee v. Astor et al., 2 Howard, 341, the following:

"The purchaser under it is not bound to look beyond the decree. If there is error in it of the most palpable kind, if the
180 court which rendered it have, in the exercise of its jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of the purchaser is as much protected as if the adjudication would stand the test of a writ of error; and so where an appeal is given, but not taken, in the time allowed by law." This case and the case of Voorhees v. The Bank of the United States, 10 Peters, 449, are the leading authorities in this court upon the subject. Other and later cases have followed and been controlled by them. Stow v. Kimball, 28 Illinois, 93, affirms the same doctrine."

And again in Davis v. Gaines, supra, the law as laid down in Thompson v. Tolmie is reiterated in the following language:

"The law appears to be settled in the States that courts will go far to sustain bona fide titles acquired under sales made by statutes regulating sales made by order of the orphans courts. When there has been a fair sale the purchaser will not be bound to look beyond the decree, if the facts necessary to give the court jurisdiction appear on the face of the proceedings."

And the court goes further in the case of Davis v. Gaines to say that:

"It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order on the face of which the purchase was made, authorized the sale."

The next question inviting our attention is that of notice. The appellant derives his title to the lands in question under a deed executed by the heirs of W. H. Thomas, deceased, lunatic, to J. S. Bailey dated April 18th, 1903, and a deed from Bailey and wife to appellant dated the 26th of September, 1906. The deed from Terrell, Commissioner, to Loomis & Wheeler conveying timber on the lands in Swain County was duly recorded in that county on the 31st of August, 1883, and the two deeds for timber on the lands in Graham County placed on record in that county on the 31st of December, 1884.

It is well settled in North Carolina that this recordation of the Loomis & Wheeler deeds was notice to Bailey at the time he purchased, for the decisions of the Supreme Court of the State are uniform to the effect that where an instrument affecting the title to real

estate is properly recorded the record thereof is notice to a subsequent purchaser from the same grantor. The citation of a
181 few of the many North Carolina cases declaring this to be the law will be sufficient. In Taylor v. Eatman, 92 N. C., reprint, 593, it is held that:

"Registration of a prior voluntary deed is notice to a subsequent purchaser."

And in Austin v. Staten, 120 N. C., 783, it is held in substance that registration of a deed under the laws of North Carolina is required, for the purpose of notice to a subsequent purchaser.

The record discloses the fact that the description of the lands upon which the timbers conveyed to Loomis & Wheeler were standing was fully set out in the recorded deeds. This constituted notice to all the world of what the deeds contained, and Bailey's purchase after the registration charged him with such notice. And it is an established proposition that any fact which is sufficient to put a purchaser of land on inquiry is adequate notice, and of everything to which such inquiry may lead. Shauer v. Alterton, 151 U. S., 607, Thompson and wife et als. v. Blair et als., 7 N. C., 583 (Murphey's Law & Equity, Vol. III.)

If our reasoning is well grounded, and it seems to us that it is, the conclusion follows that the Probate Court had jurisdiction to make the decree directing Terrell as Commissioner to sell property of the lunatic; that Louis & Wheeler bought and took title by virtue of this decree; that rights thus vested cannot be attacked collaterally in a proceeding inter alios acta, and that Bailey bought in 1903 the lands upon which the timber conveyed to Loomis & Wheeler is located with notice of their title, and subject to their said rights.

We might, therefore, stop here and affirm the decree of the Circuit Court, and we would do so, but there is a further view of the case presented in the record, and argued by counsel which we think it would be well to consider. This view is based upon proceedings had before the clerk of the Superior Court of Jackson County, and in the Superior Court of said county, subsequent to the dates which have been hereinbefore recited.

The proceeding in the name of Hilliard, as guardian, continued before the clerk, and was pending on the 25th of October, 1889, when Hilliard resigned as guardian, and James R. Thomas (a son of the lunatic), who had become of age in the meantime, succeeded to the guardianship of his father. On the day of his appointment Thomas filed his petition as guardian before the clerk, in
182 which he sought to make sales of the real estate of the lunatic for purposes set out in his petition, and also to collect the purchase money for sales made by Terrell and convey to the purchasers, etc.

The lunatic died intestate in June, 1893, and James R. Thomas, the son, became administrator upon the intestate's estate. Before that, the lunatic's daughter, Sallie L. Thomas, had intermarried with A. C. Avery, and William H. Thomas, Jr., a son of the lunatic had died, leaving him surviving as his only heirs at law, Sallie Thomas, William Thomas, Love Thomas, De Witt Thomas, Bryan Thomas

and Mary Thomas, all infants, and for whom James R. Thomas became guardian.

On the 9th of January, 1899, a petition was filed before the clerk of the Superior Court of Jackson County in the name of James R. Thomas, A. C. Avery and wife, Sallie L. Avery, and James R. Thomas, as administrator of the estate of William H. Thomas, Sr., deceased, of full age, and Sallie Thomas, William Thomas, Love Thomas, De Witt Thomas, Bryan Thomas and Mary Thomas, by their guardian, James R. Thomas. In this petition the several petitioners as the only heirs at law and next of kin of the deceased lunatic sought to have the proceeding instituted by Hilliard, and that instituted by Thomas, as guardians, consolidated, and to have themselves made parties plaintiff in the consolidated case. And the petition went further to allege that Terrell had been appointed Commissioner to sell lands and convey the same to purchasers as provided in the order of the Probate Judge of Jackson County; that he had sold a number of tracts of land and had collected the purchase money, and had also sold and cut timber for which he had not accounted. The petitioners prayed that the sales, receipts, disbursements, and liabilities of Terrell, as Commissioner, and the account of James R. Thomas of sales of land, of disbursements of the proceeds of such sales by him as guardian of said Thomas, and as Commissioner, be referred to a competent accountant to examine and report to the court after notice to the parties interested.

Upon the petition, the clerk of the Superior Court of Jackson County, on the 6th day of July, 1899, entered an order consolidating the two proceedings, also confirming sales made by James R. Thomas, as guardian, and directing him to make title for land sold by Terrell before the qualification of said Thomas as guardian upon the collection of the purchase money.

On the 8th of September, 1899, the counsel for the petitioners, and for Terrell, filed an agreement in the case before the clerk, in which appears the following:

183. "It is further agreed that this special proceeding, entitled as above, shall be entered upon the docket of the Superior Court of Jackson County at the Fall term, 1899, thereof, to be then further proceeded with according to law, and for all purposes."

The clerk entered his order on the same date transmitting the entire case to the Superior Court, and it was docketed for the Fall Term, 1899. After the case was so docketed, the Superior Court appointed M. W. Bell and Thomas A. Jones to take and state an account of the transactions of Terrell, as Commissioner, and also to report to the court upon the issues and questions of fact and of law raised by the pleadings in the case. In discharge of their duties the said referees took an account of the dealings of Terrell, as Commissioner, including the sales of land and timber, his collections and disbursements in connection with the estate of the lunatic. They made a report at length of the findings of fact and conclusions of law to the court on the 26th of February, 1905. They found as a fact that there was a small balance due Terrell from the estate, and among their conclusions of law they submitted these two:

"That this proceeding was properly begun in the Probate Court of Jackson County by virtue of Chapter 57, of Battle's Revisal, and that the clerk of the Superior Court of said county by operation of law and statute in such case made and provided succeeded to the functions which the Probate Judge had theretofore exercised and had."

"We conclude as a matter of law that said Terrell had a right to sell the timber on the Graham and Swain County lands with the approval of the clerk of the Superior Court and that the order of said clerk protects him in the sales made to Loomis & Wheeler."

There were no exceptions to this report, and at the October term, 1905, of the court, judgment was entered confirming the same in all particulars. All parties acquiesced in this judgment, and the same was, therefore, final.

We think that aside from being concluded by this judgment, the heirs at law of the lunatic when they voluntarily made themselves parties to the proceeding in which the timber was sold to Loomis & Wheeler, and sought to hold Terrell to an account for the purchase money, and recover the same from him if he was still liable therefor, thereby ratified the sales and were estopped to impeach the title of the purchasers.

184 The remaining question is as to the effect of the final judgment of the Superior Court upon the rights of Bailey who purchased and took deed from the heirs at law of Thomas, who were parties to the proceeding. Bailey bought in 1903 whilst the case was still pending in the Superior Court. The jurisdiction of the Superior Court in the case transmitted by the clerk, and of all matters in controversy therein is settled, we think, by a Statute of North Carolina, and decisions of the Supreme Court of that State construing it. The Statute we refer to is Chapter 276, Public Laws of North Carolina of 1887 from which we quote:

"That whenever any civil action or special proceeding begun before a clerk of any superior court shall be for any ground whatever sent to the superior court before the judge, the said judge shall have jurisdiction; and it shall be the duty of said judge upon the request of either party to proceed to hear and determine all matters in controversy in such action."

Referring to this Statute in Oldham v. Rieger, 145 N. C., 254, the Supreme Court says:

"That whenever a cause which was originally brought before the clerk is constituted in the Superior Court at term by transfer, appeal or in any other way, the court shall proceed to hear and determine all matters in controversy."

And in Re Anderson, 132 N. C., 243, treating of this same statute the court declares:

"Whenever any civil action or special proceeding begun before a clerk of the Superior Court shall be, for any ground whatever, sent to the Superior Court, the said court shall have jurisdiction, although the proceedings originally had before the clerk were a nullity."

And in Railroad v. Stroud, 132 N. C., 413, it is held that a case

on appeal to the judge from the clerk is as fully before the judge as if it had originally been returned before him.

We cite also Smith v. Pipkin, 79 N. C., 589, supra, 610, in which it is held that the Superior Courts have concurrent jurisdiction with the Courts of Probate over intestates and their estates.

Were the timber rights of Loomis & Wheeler or the Thomas lands called in question in the Superior Court, or the title derived to them by the deeds from Terrell involved in the controversy? It plainly appears that the Superior Court took cognizance of these questions. The reference found as shown by the quotations from the report that the Probate Court and the clerk had jurisdiction, and further that Terrell had the right to sell the timber to Loomis & Wheeler. These were legal conclusions which were confirmed by the judgment of the court, and it is not our province to assume that the court exercised jurisdiction over matters not before it.

The Supreme Court of North Carolina in Dawson v. Dawson, 56 N. C., supra, 98, decided:

"If property is transferred by the defendant pending a suit involving its title, in which there is afterwards a judgment for the plaintiff, the judgment relates to the beginning of the action and binds the property in the hands of the purchaser."

See also Rollins v. Henry, 78 N. C., supra, 227.

And again, in Bird v. Gilliam, 125 N. C., 78, the court held that:

"A purchaser of lands in litigation is constructively fixed with notice, and takes his conveyance from a party to the suit subject to the final adjudication."

These decisions, both of which were rendered before the conveyance to Butler was executed, established a rule of property in North Carolina, which we cannot disregard in passing upon property rights in that State.

The appellant, who bought from Butler in 1909, took by his deed only such right as Butler could convey, which, we are led to conclude, was the title to the lands in question subject to the timber rights under the deeds from Terrell to Loomis & Wheeler.

The decree of the Circuit Court is affirmed and the cause remanded to the end that further proceedings may be had in harmony with this opinion.

Affirmed.

187 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of

the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 2nd day of December, A. D., 1910.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

188 SUPPLEMENTAL TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, on the first Tuesday in November, being the first day of the same month, in the year of our Lord one thousand nine hundred and ten.

Present:

Hon. Nathan Goff, Circuit Judge,
Hon. Henry C. McDowell, District Judge,
Hon. John C. Rose, District Judge.

Among other were the following proceedings, to-wit:

No. 946.

C. H. REXFORD, Appellant,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

Appeal from the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

July 14, 1910, decree of Circuit Court affirmed, with costs. Decree filed.

Afterwards, to-wit, on December 16, 1910, the following notice of motion is filed in Open Court, to-wit:

Notice of Motion

Filed in Open Court December [illegible] 1910

In the United States Circuit Court of Appeals, Seventh Circuit, 1910.

C. H. Ransom, Appellant

vs.

The Pneumatic Gas Co. and Consolidated Gas Co., Appellees

Notice

To Messrs. Parker and Martin, attorneys for the appellees herein:

Please take notice that the appellee will move the court on the [illegible] day of December, 1910, at Richmond, Virginia, or as soon thereafter as it can be heard, to enter upon the record nunc pro tunc the following order:

When the above cause was called for argument at the February Term, 1909, the court was composed of Circuit Judge Goff and District Judges Rose and Dismuke, and the counsel for the appellant called the attention of the court to the fact that Judge Rose had been the counsel to remand the case to the State Court, and had, [illegible] the case, and that an exception had been entered to such action. He suggested that Judge Rose was not qualified to sit on the hearing of the Court in hearing the argument. The Court [illegible] if the exception to the denial for motion to remand would be sustained then the argument and counsel for the appellant proceed, that is, would note that counsel believed that case had been improperly removed, that the court had jurisdiction. Counsel for the appellee [illegible] stated that there was no objection to Judge Rose sitting. Thereupon the argument proceeded and the case heard.

The Court will be asked to enter such order in the premises as shall be in accordance with the facts.

This the [illegible] day of December, 1910.

JAMES H. BEERMAN

Counsel for Appellee

Service accepted.

[illegible] MARTIN

Counsel for Appellant

[illegible] Whereupon, it is ordered, by the Court, that the [illegible] be, and the same is hereby, allowed the following order to wit:

Order on Motion.

Filed and Entered December 16, 1910.

United States Circuit Court of Appeals, Fourth Circuit.

No. 946.

C. H. REYNOLDS, Appellant,
vs.
THE BRUNSWICK-BALKE-COLLENDER COMPANY, Appellee.

Order.

On motion of counsel for the appellee, counsel for the appellant consenting thereto, Ordered that the Clerk of this Court certify to the Supreme Court of the United States as a part of the record in this cause the following:

"When the above cause was called for argument at the February Term, 1910, the court was composed of Circuit Judge Goff and District Judges Boyd and Dayton, and counsel for the appellant called the attention of the court to the fact that Judge Boyd had heard the motion to remand the case to the State Court and had denied the same, and that an exception had been entered to such denial, and suggested that Judge Boyd was not qualified to sit as one of the Judges of the court in hearing the appeal. The court then asked if the exception to the denial for motion to remand would be insisted upon in the argument, and counsel for the appellant replied that it would not; that counsel believed the case had been properly removed, and that the court had jurisdiction. Counsel for the appellant further stated that there was no objection to Judge Boyd sit-
191 ting; thereupon the argument proceeded and the case heard."

The Clerk will enter this order nunc pro tunc as of February 18, 1910, and the same shall be a part of the record of the said cause in the Supreme Court of the United States as if it had been certified with the said record.

Dec. 16, 1910.

NATHAN GOFF,
Circuit Judge, Presiding.

We consent.

JULIUS C. MARTIN,
Attorney for Appellant.
JAMES H. MERRIMON,
Attorney for Appellee.

Clerk's Certificate.

United States of America,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true and full record of the supplemental proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 17th day of December, A. D. 1910.

[Seal. United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

192 [Endorsed:] Supplemental Record. No. 948. C. H. Rastetter, Appellant, vs. The Brunswick-Balke-Collender Company, Appellee. Filed [illegible].

193 [Endorsed:] File No. 22,447. Supreme Court U. S. October Term, 1910. Term No. 948. C. H. Rastetter, Petitioner, vs. The Brunswick-Balke-Collender Company. Supplemental transcript of record. Filed December 19, 1910.

194 United States Circuit Court of Appeals, Fourth Circuit.

United States of America, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 7th day of January, 1911, by certifying hereto a certified copy of the arraignment of the attorneys of record, that the transcript already filed in the Clerk's Office of the Supreme Court of the United States on the petition for the writ of certiorari be taken as a return to the said writ.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 23d day of January, A. D. 1911.

[Seal. United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

195 In the Supreme Court of the United States, October Term, 1910.

C. H. REXFORD, Plaintiff in Error,
vs.
BRUNSWICK-BALKE-COLLENDER COMPANY, Defendant in Error.

It is hereby stipulated that the transcript already filed in the Clerk's Office in the Supreme Court of the United States on the petition for the writ of certiorari be taken as a return to said writ.

This the 9th day of January, 1911.

JULIUS C. MARTIN,
TUCKER & LEE,
Counsel for Plaintiff in Error.
JAMES H. MERRIMON,
Counsel for Plaintiff in Error.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed January 31st, 1911, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 31st day of January, A. D., 1911.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

196 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which C. H. Rexford is appellant and The Brunswick-Balke-Collender Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Western District of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of
197 the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the

record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of January, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

198 [Endorsed:] File No. 22,447. Supreme Court of the United States. No. 826. October Term, 1910. C. H. Rexford vs. The Brunswick-Balke-Collender Co. Writ of Certiorari. The execution of the within writ appears from certain schedules thereunto annexed. Henry T. Meloney, Cl'k U. S. Cir. Court of Appeals.

199 [Endorsed:] File No. 22,447. Supreme Court U. S. October Term, 1910. Term No. 826. C. H. Rexford, Petitioner, vs. The Brunswick-Balke-Collender Co. Writ of certiorari and return. Filed February 1, 1911.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1910.

C. H. REXFORD, PETITIONER,

v.

THE BRUNSWICK BALKE-COLLENDER COMPANY, RESPONDENT.

ON MOTION FOR CERTIORARI.

NOTICE.

To Brunswick Balke-Collender Company, Defendant.

The defendant, above named, is hereby notified that the complainant, C. H. Rexford, will, on Monday the 19th day of December, 1910, upon his verified petition and a copy of the entire record in this cause, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of certiorari and brief in support thereof are herewith delivered to you,) to the Supreme Court of the United States, in its Court room at the Capitol, in the City of Washington, District of Columbia.

This the.....day of December, 1910.

.....

.....

Attorneys for Petitioner.

The foregoing notice is hereby accepted and delivery of a copy thereof and of the petition for writ of ceriorari and

brief in support of the petition therein referred to, are hereby acknowledged.

This the.....day of December, 1910.

.....

Attorney for Respondent.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

C. H. REXFORD, Petitioner,

vs.

THE BRUNSWICK BALKE-COLLENDER COMPANY, Respondent.

Now comes C. H. Rexford, by J. C. Martin, counsel, and moves this honorable court that it shall, by certiorari or other proper process directed to the honorable, the Justices of the United States Circuit Court of Appeals for the Fourth Circuit, require said court to certify to this court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the petitioner, C. H. Rexford, was appellant, and the respondent, the Brunswick Balke-Collender Company, was appellee; and to that end he tenders herewith his petition and brief with a certified copy of the entire record of said cause in said Circuit Court of Appeals.

This the.....day of December, 1910.

.....

Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

C. H. REXFORD, PETITIONER,

v.

THE BRUNSWICK BALKE-COLLENDER COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

Your petitioner, C. H. Rexford, respectfully represents to this honorable court:

That it seems to your petitioner that a writ of certiorari ought to issue in this cause for a review thereof by this court on the following grounds:

First.—In the interests of jurisprudence and uniformity of decisions between this honorable court and the said Circuit Court of Appeals, there being, as your petitioner is advised and believes, a substantial conflict of decision between the decision of said Circuit Court of Appeals and this honorable court on a vitally and controlling matter in the said cause.

Second.—Because, as your petitioner is advised and believes, there is a conflict of decision between the said Circuit Court of Appeals and the Supreme Court of North Carolina.

Third.—Because, as your petitioner is advised and believes, one of the judges who, by inadvertence and by consent of counsel for the petitioner, sat on the trial of said cause in the United States Circuit Court of Appeals, was incompetent to sit thereon because he had heard a question in said cause in the Circuit Court and had decided the same, to-wit: had decided the motion of the complainant in this cause made in said Circuit Court, to remand the same to the State Court, facts concerning this matter being hereinafter more particularly set forth.

Fourth.—And in this behalf your petitioner further shows unto this honorable court:

I.

That your petitioner, C. H. Rexford, was, at the com-

mencement of this action and is now a citizen and resident of the State of Pennsylvania, and that the respondent, The Brunswick Balke-Collender Company, was at the commencement of this action and is now a corporation organized under the laws of the State of Delaware and a citizen of said last named State, and that W. C. Huyser, who was a defendant in this cause at its beginning, was a citizen and resident of the State of Tennessee.

II.

That the history of this case and the facts on which the suit was founded, are in brief as follows:

(1) On the 9th day of June, 1908, your petitioner brought a civil action in the Superior Court for the County of Swain, in the State of North Carolina, the same being a court of general jurisdiction, against the respondent, The Brunswick Balke-Collender Company and one W. C. Heyser, the summons in which action was served on the said Heyser, defendant therein, on the 12th day of June, 1908, and was made returnable to said court on the 27th day of July, 1908; that at said July Term, 1908, of the said Superior Court of Swain County, counsel for the other defendant entered a general appearance for it, and entries were made in said cause as follows: "plaintiff allowed sixty days in which to file a complaint," "defendant allowed thirty days after notice to answer," "complaint filed September 30th, 1908."

At October Term, 1908, of the Superior Court of Swain County, the defendants filed a petition to remove this action to the United States Circuit Court for the Western District of North Carolina, and upon such motion the judge found the following facts from inspection of the record and from affidavits filed and made an order declining to remove said cause:

"1. The summons was issued June 12th, 1908, returnable to the July Term, 27th of July, 1908.

2. Said summons was served on W. C. Heyser June 12th, 1908, and was not served on the defendant company.

3. At the said July Term, Messrs. Bryson and Black,

attorneys at law, entered a general appearance for both defendants.

4. At said term, plaintiff in open court, moved for time to file complaint and was given sixty days to file complaint, and defendants on motion of counsel were allowed thirty days to file answer after notice that complaint had been filed.

5. The complaint was filed September 30th, 1908, and no notice given to defendants.

6. This motion was made, and petition and bond filed October 28th, 1908.

7. The bond is solvent and good for $500.00.

8. The plaintiff is a resident and citizen of the State of Pennsylvania. W. C. Heyser is a citizen and resident of Tennessee, and the other defendant is a corporation chartered under the laws of Delaware.

9. The action is to remove cloud of title of a tract of land and damages for trespass, situated in Swain and Graham counties, North Carolina.

Upon the foregoing facts found I decline to order the removal.

R. B. PEEBLES, Judge Presiding.

To the above decision the defendants except.

R. B. PEEBLES, Judge."

Said finding of facts and order of the judge were made upon the pettion of the defendants in said cause to remove the same to the United States Circuit Court as appears in the record in this cause. Subsequently the defendants having caused a certified copy of the record in said cause to be filed in the United States Circuit Court, the complainant, on November 7th, 1908, made a motion in the United States Circuit Court for the Western District of North Carolina, at Asheville, to remand said cause to the State court. On the same day at the November Term of said court said motion to remand was heard before his Honor, James E. Boyd, Judge Presiding, and denied. See Record pp. 17 and 18. To the denial of this motion the complainant excepted, which exception was then and there allowed by said judge. Record p. 18.

Subsequently the complainant filed in said cause in the United States Circuit Court an amended complaint in which he alleges that he was the owner and entitled to the possession of a large tract or boundry of land situated in the counties of Swain and Graham, lying on both sides of the Little Tennessee River and particularly described in the original complaint filed in said cause and was in possession of the same; that the defendants claimed to own a large number of trees standing and growing on the lands owned by the complainant under and by virtue of a pretended deed "which purports to have been executed by one James W. Terrell, purporting to act as commissioner to sell the lands of William H. Thomas, lunatic, to Xenephon Wheeler and J. F. Loomis," registered in Swain County, North Carolina, in Record of Deeds D, at page 48, and in Graham County, in Book C, at pages 172, 180 and 183 of the Records of Deeds in said last named county, and pretended deed purporting to have been executed by J. F. Loomis and Xenephon Wheeler to W. C. Heyser, and by two pretended deeds from said Heyser to the defendant company, all duly recorded.

And the complainant further alleged that said James W. Terrell had no authority whatsoever, acting as commissioner or otherwise, to sell and convey said trees and that said purported deeds for said trees were void and constituted a cloud upon the title of the complaint.

And the complaint further alleged that about twenty-seven years had elapsed since the making of said pretended deed or deeds from said Terrell to said Loomis and Wheeler and that said Loomis and Wheeler, and those claiming under them, long prior to the pretended purchase by this defendant of their claim to said trees, abandoned and renounced any and all pretended right or title to said trees and that the plaintiff and those under whom he claims had been in continuous and uninterrupted possession and control of said land and trees paying taxes thereon for more than twenty years and that during said time the defendant and those under whom he claimed had set up no right or claim thereto.

The defendant answered the amended bill of complaint

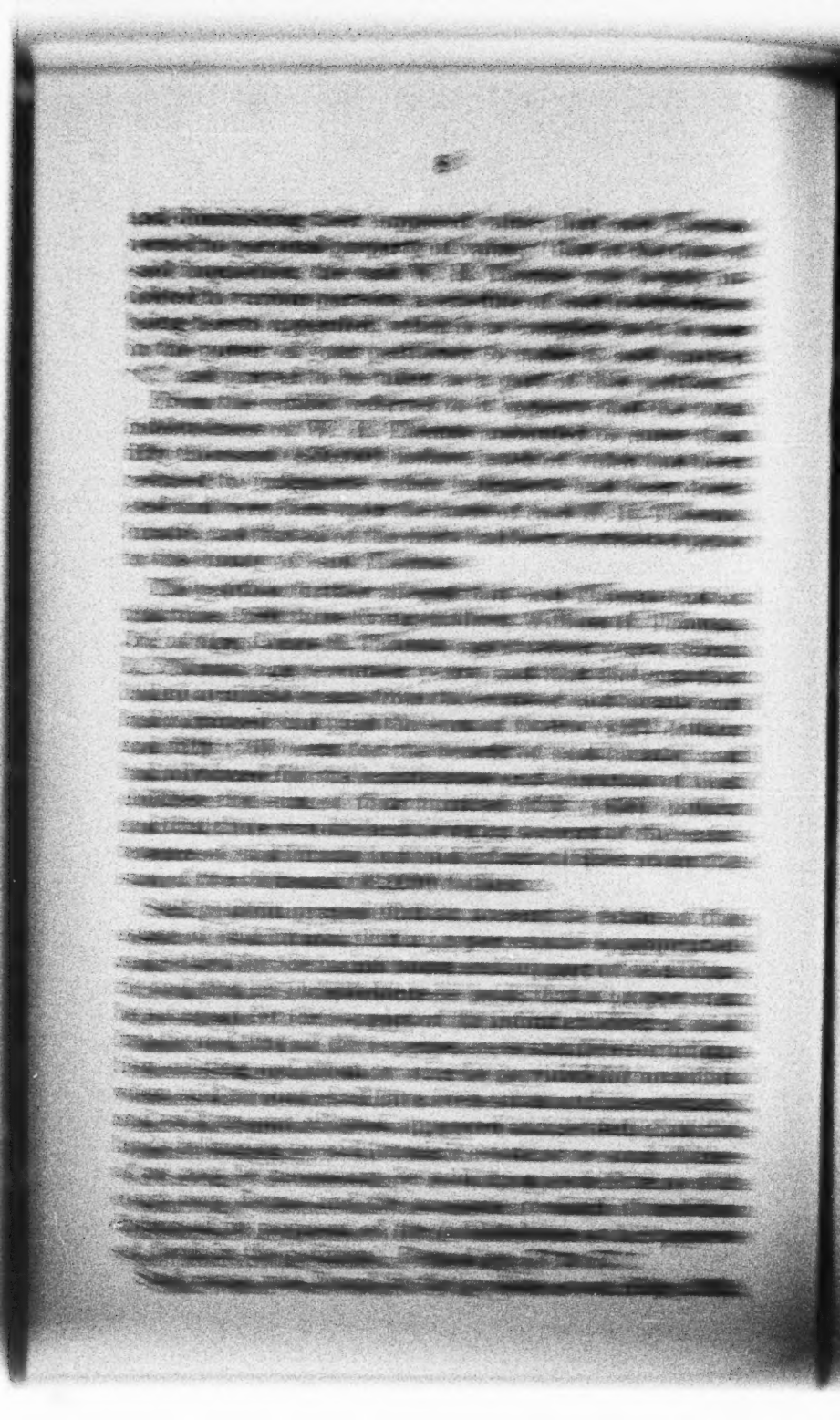
of the complainant and the case came on to be heard before his Honor, J. C. Pritchard, Circuit Judge, and was heard June 1st, 1909, who entered a decree therein adjudging that the defendant, Brunswick Balke-Collender Company, was the owner of the trees claimed by it in said alleged pretended deeds of conveyance and that the complainant had no right, title or interest thereto.

From this decree the complainant appealed to the United States Circuit Court of Appeals where said case was heard at February Term, 1910, and decided July 13th, 1910, the opinion therein having been delivered by James E. Boyd, District Judge.

III.

That it appears from the testimony in said cause that the lands described in the complaint therein originally belonged to one W. H. Thomas, under whom the trees in controversy in this cause were claimed both by the complainant and by the defendant; that the said W. H. Thomas, on the 15th day of May, 1877, was adjudged a lunatic and confined in the asylum for the insane in the City of Raleigh, North Carolina, where he was maintained as a pauper, and that on the 5th day of April, 1878, one W. L. Hilliard was appointed guardian for said Thomas; that on the 17th day of May, 1880, a petition was filed in the probate court of Jackson County, North Carolina, by the said W. L. Hilliard, Guardian of said Thomas, in which he alleged that "the said W. H. Thomas was the owner of many tracts and parcels of land in the counties of Haywood, Jackson, Swain, Macon, Graham, Clay and Cherokee, a description of which complete as it is now of your petitioner to make it, in his Ex. appended marked 'A' and prayed to be taken as a part of this petition. (No exhibit A was attached or found.)

That a large majority of these tracts are isolated, wild mountain lands of little value, their rents and profits insufficient to pay the taxes, while other and more valuable tracts have been entered, grants taken on them, and trespasses committed, thus involving serious litigation, and by this, casting clouds upon the title, greatly lessening



1880, which court found facts set forth in said record, pp. 79 to 83, which were in substance as follows:

"4th. I find further that said judgments (William Johnston and R. B. Johnston in the sum of $35,887.11) have all been paid except the sum of about eight thousand dollars, yet remaining due and unpaid, for which the entire estate of the said lunatic's property is held.

"5th. I find as near as can be ascertained that the said lunatic owes undocketed judgments in various counties about the sum of seven thousand ($16,000) dollars over and above the above mentioned Johnston judgments, and that there are many notes and claims made against his estate.

"6th. I find that the real estate in which the said lunatic has an interest subject to the aforesaid Johnston judgments, consists of a large number of small and isolated tracts of land in the various counties of Cherokee, Graham, Swain, Macon, Jackson and Clay, from fifty acres and upwards, amounting in the aggregate to about four thousand acres, and ranging in value from fifty cents to two dollars per acre if sold on time, but if forced into sale for cash, would not bring more than one-fifth of said amount.

"7th. I find that the larger and more valuable tracts of land belonging to the said lunatic are involved in serious litigation, requiring large expenditures of money for the necessary costs, fees and attention."

The court further found that the indebtedness accrued on account of costs of litigation, fees, commissions and the support of the lunatic and his infant children, amount to about four hundred and fifty ($2,450) dollars and that for the support and subsistence of said lunatic and said infant children one thousand ($1,000) dollars per annum were necessary and that the costs and fees would be not less than one thousand ($1,000) dollars to twelve hundred ($1,200) dollars per annum. Thereupon the court ordered that certain sums be set apart for the support and maintenance of said lunatic and his two minor children, for the costs and expenses of litigation concerning the estate of said lunatic and further ordered as follows:

"3th. It is ordered that James W. Terrell, of the county of Jackson, be appointed Commissioner to make sale of the lands belonging to said lunatic, selling first such as may be discovered as not to be included in the above mentioned Johnston judgment lien and not involved in other litigation, and as may be most available, and from time to time such lands as are included in the Johnston judgment lien, and which may be discharged therefrom, either by payment of the said judgments, or by reconveyance of the said Johnston, until he shall realize the sum of seventeen thousand two hundred fifty ($17,250) dollars. And to this end

"7th. It is ordered and adjudged that the said Commissioner, Jas. W. Terrell, sell such lands at private sale on the terms one-fourth cash at the time of sale, and the balance in one and two years equal installments, with interest from date, and that he report semi-annually the amount of such sales, to whom sold, at what date, the particular tracts sold, and the amounts received."

On the 8th of April, 1885, said Jas. W. Terrell, Commissioner, filed a report in the office of the Clerk of the Superior Court of Jackson County, the same being the probate court, in which he set forth, among other things, as follows:

"Sold trees in 1883, $1,129.60, and sold trees in 1884, $1,051.90;" his report also showed the sale of a large number of tracts of land, realizing in all the sum of $9,778.96. Record pp. 84 to 86. His report further showed that he had disbursed the sum of $9,129.52 and that of these disbursements he had paid to the guardian of the lunatic only the sums of $100 on November 3rd, 1883, Record p. 91, and $100, May 25th, 1885, Record p. 92, and the other funds had been paid out on debts contracted by the lunatic prior to his lunacy and on costs and expenses of litigation and for attorneys fees and other causes not included in the support of the lunatic or his family. This report of said commissioner was approved in the following meagre terms on April 1st, 1885: "Sworn to and subscribed before me this April 1st, 1885, and all

sales confirmed in said report. J. W. Fisher, Clerk Superior Court."

It further appeared in the evidence that the defendant claimed the trees in dispute in this cause under three alleged deeds of conveyance from said Jas. W. Terrell, Commissioner, one dated the 3rd day of August, 1883, one dated the 27th day of December, 1884, and the other dated the 27th day of December, 1884, and that said deeds of conveyance had been recorded, the first in Swain County, North Carolina, August 31st, 1883, and the others in Graham County, North Carolina, December 31st, 1884.

There was no further or other report of the alleged sale and conveyance of the trees mentioned and no further or other description than that above set forth of the property sold, and no further or other confirmation of said sale and no directions anywhere in the record in said probate court to make any such deed or deeds of conveyance as those under which the defendant claimed said trees and nothing to show to the court, at the time it undertook to confirm said sales, what sales had been made.

The complainant set forth his title to the lands claimed by him in full and showed by the records introduced that the lands of W. H. Thomas, who died on the.....day of May, 1893, were sold for the partition in a proceeding brought for that purpose in the Superior Court of Jackson County, North Carolina, which proceeding was begun on the 15th day of April, 1893. and that the lands claimed by the plaintiff were duly sold at that proceeding, bought in by one J. S. Bailey to whom they were conveyed and conveyed by Bailey to the complainant in this cause.

IV.

On the 25th day of May, 1889, the said W. L. Hilliard, having resigned as guardian of W. H. Thomas, lunatic, Jas. R. Thomas was appointed guardian and on October 25th, 1889, filed his petition before the Clerk of the Superior Court for Jackson County, praying authority to sell the lands of said lunatic, which prayer was granted and an order entered authorizing him as guardian to sell the lands of the lunatic, but no conveyance was made by

said Jas. W. Thomas guardian, which in any way affects the lands in this action.

After the death of said W. H. Thomas, to-wit: on the 9th day of January, 1899, the heirs at law of said Thomas and his administrator filed a petition in the Superior Court of Jackson County, North Carolina, the object of which was to compel Jas. W. Terrell, the commissioner appointed in the original proceeding in the probate court to account for the money which had come into his hands as such commissioner from the sale of the lands belonging to said W. H. Thomas, lunatic. In said petition the only reference to timber therein, as in paragraph eleven thereof, Record page 101, in which the petitioners allege that said commissioner "sold a large amount of timber cut from the land of W. H. Thomas, Senior, and is accountable for the value thereof and negligently caused the loss and destruction of much valuable timber for the value of which he is accountable on settlement with the estate of said Thomas as for money had and received for their use." No reference whatsoever is made in this petition to the sale by said Terrell, Commissioner, of any standing timber. While said proceedings was still pending, on the 24th day of October, 1899, by consent of the parties, it was referred to a referee who "was authorized and directed to report upon all issues and questions of fact and law raised by the pleadings in this cause and especially to take and state an account of the sales of land of W. H. Thomas, Senior, made by the said Jas. W. Terrell, by virtue of the authority vested in him by the order in the above entitled cause constituting him commissioner, and of the receipts and disbursements of the purchase money received from the purchaser of any such land of which in the exercise of ordinary care, diligence and good faith on the part of said Terrell ought to have been received," and generally to state an account of the said Terrell's administration as commissioner.

In this order of reference no mention is made whatsoever of trees standing on land or any other matter which would put a purchaser on notice that there was an adverse claim of trees standing on some of the lands belonging to the estate of W. H. Thomas.

The referee, on the 20th day of February, 1905, after the complainant's title had passed out of the heirs of W. H. Thomas by the deed of conveyance made by them in 1903, through the partition proceeding, reported as follows: "We find that the said James W. Terrell as commissioner, in 1883 and 1884, sold and conveyed to *J. F.* Loomis and Xenophron Wheeler, poplar and white pine trees situate upon the lands of the estate in Graham and Swain Counties to the amount of twenty-one hundred and eighty-one and fifty one-hundredths ($2,181.50) dollars, which were reported to and confirmed by the court; we find that this price was reasonable and fair value for the same at the time of the sale." Record p. 111.

The Circuit Court of the United States and the United States Circuit Court of Appeals each held:

First.—That the said proceeding originally begun by W. L. Hilliard, Guardian of W. H. Thomas, lunatic, and the orders made therein in 1880 and 1885, as hereinbefore set forth, were legal, that the court had full jurisdiction and that the order authorized the commissioner for the lunatic to sell timber trees standing on land with an indefinite and interminable right to enter upon the lands and remove the same at any time the purchaser saw fit, and further that by virtue of the proceeding begun in 1890 by the heirs at law and administrator of W. H. Thomas, to require Jas. W. Terrell, Commissioner, to account for the money received and which ought to have been received by him while acting as such commissioner even if the original proceeding as instituted by Hilliard, Guardian, was insufficient to pass the title of the defendant for the trees mentioned, nevertheless this latter proceeding validated the original ineffective one and thereby perfected the title of the defendant to the trees claimed in this cause.

A copy of the opinion of the Circuit Court of Appeals is set out in the record in this cause.

V.

The petitioner here insists that the said judgment of

the said Circuit Court of Appeals was erroneous and contrary to law in the following particulars:

First.—That the said Circuit Court erred in refusing to remand the said cause to the state court for trial, Record pp. 17 and 18. The act of Congress referring to this matter, Sec. 3 of the act of March 3rd, 1887, provided as follows, "that whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from the state court to the Circuit Court of the United States, he may make and file a petition in such suit in such state court at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff."

Under the laws of North Carolina the defendants were required to answer or demur during the term to which the summons was made returnable. The statute of North Carolina, Sec. 473 of the Revisal, provides as follows: "The defendant shall appear and demur or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default."

In the case at bar, after the defendant, Brunswick Balke-Collender Company, had entered a general appearance without service of process on it, by consent of counsel plaintiff was allowed sixty days to file his complaint and the defendant thirty days after notice thereof to answer. The question here presented is whether or not the defendant's petition to remove was filed in that time. Under the decision of the State of North Carolina it was not so filed.

Bryson v. Railroad, 141 N. C., 594.
Howard v. Railroad, 122 N. C., 949.

See also the following cases in the United States Supreme Court:

Remington v. Central Pacific Railroad Co., 198 U. S., 194.

Pullman Palace Car Co., v. Speck, et al., 103 U. S., 866.

Wabash Western Railroad Co., v. Brow, 164 U. S., 271.

Goldeg v. Morning News, 146 U. S., 518.

Second.—That the said probate court of the State of North Carolina, being a court of special and very limited jurisdiction, had no jurisdiction to make the order of sale of the property of the lunatic for the payment of his debts which was the evident purpose of said proceeding.

Blake v. Respass, 77 N. C., 193, 194.

Third.—That the order of the court, even if it had jurisdiction to sell the land of the lunatic, did not justify the commissioner in selling timber standing on the land with an indefinite and indeterminable right to the alleged purchaser to go upon the land and remove the trees therefrom at any time in the future when it suited his convenience to do so.

Fourth.—That the proceeding on the petition filed in said probate court in 1899 requiring said Jas. W. Terrell to account for money and property received by him as such commissioner, the subsequent reference therein, and the report of the referees filed in said proceeding made in 1905 after the plaintiffs' title had passed from the heirs of W. H. Thomas, deceased, by proper proceeding, to the plaintiffs in 1903, could not and did not affect the plaintiff's rights in any way or manner not having been a party to said proceeding and the alleged sale of the trees claimed in this cause not having been brought into question in that proceeding until the filing of the report therein by the referees in 1905 after the title claimed by the complainant had passed from the heirs of W. H. Thomas.

Fifth.—That his Honor Judge Jas. E. Boyd was not competent to sit upon the hearing of said cause in the Circuit Court of Appeals because the statute of the United States, Act of Congress March 3rd, 1891, Ch. 517, Sec. 3, provides as follows: "provided that no justice or judge before whom a cause or question may have been tried or heard in the district court or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."

That as the petitioner is informed and believes when

this cause came on for hearing in the Circuit Court of Appeals the attention of the court was called to the fact that his Honor Judge Boyd had sat on the case in the Circuit Court and had made the order denying the motion to remand hereinbefore referred to; that thereupon counsel for the petitioner stated that there was no personal objection to Judge Boyd's sitting in the cause and that thereupon, at the suggestion of the court, counsel consented that Judge Boyd should sit on the hearing of said cause in the Circuit Court of Appeals, but the petitioner alleges that he is advised and believes that said consent of counsel was an inadvertance on their part, made at a time when they had no opportunity to examine the statute bearing on the subject, and without knowledge that the statute forbade the judge from sitting on said trial, and that he is advised and believes, counsel had no power to waive the incompetency of the said judge and that their willingness to do so was a nullity; and that if the decision of said cause had been rendered in favor of this petitioner such judgment would have been void, and that it is no less void because it was rendered against him.

See Moran v. Dillingham, 174 U. S., 153.
Am. Car Co., v. Railroad Co., 148 U. S., 372, 386.

That consent of parties will not cure the defect, see
United States v. Emboldt, 105 U. S., 414.

Your petitioner believes that the aforesaid decree of the Circuit Court of Appeals is erroneous, and that this honorable court should require the said case to be certified to it for its reviews and determination, in conformity with the provisions of the act of Congress in such cases made and provided.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the fourth circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein, entitled "C. H. Rexford v. Brunswick Balke-Collender Co. No. 964," to the end

that the said case may be reviewed and determined by this court as provided in Sec. 6 of the act of Congress entitled "An Act to Establish Circuit Court of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes," approved March 3, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray.

.....

.....

State of North Carolina—County of Buncombe.

W. A. Rexford, being duly sworn, says, that he is the agent for the petitioner in the above entitled cause and that as such agent he is authorized to make this affidavit on behalf of said petitioner; that the facts set forth in the foregoing petition are true as he verily believes.

Sworn to and subscribed before me this the.....day of December, 1910.

.....

Notary Public, Buncombe County,
North Carolina.

My commission expires on the....day of.....191..

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1910.

C. H. REXFORD, PETITIONER,

v.

THE BRUNSWICK BALKE-COLLENDER COMPANY, RESPONDENT.

ON MOTION FOR CERTIORARI.

BRIEF OF PETITIONER.

I.

Petitioner's first assignment of error in the Court of Appeals was based on the first exception taken to the ruling of the Circuit Court refusing to remand the case to the State Court for trial. Record pp. 17 and 18. This action was brought in the Superior Court of Swain County, North Carolina, by summons issued June 9, 1908, returnable to the July Term of that court. It was served June 12, 1908, on W. C. Heyser, who was then a defendant in the case. *The summons was not served on the defendant, Brunswick Balke-Collender Company, respondent here.* But at the return term of the summons the respondent here, through its attorneys, Bryson and Black, entered a general appearance in the cause. Record p. 15. At the same term of the court the following entries were made on the Minute Docket of the court, "plaintiff allowed sixty days in which to file complaint," "defendant allowed thirty days after notice (to) answer," "complaint filed September 30, 1908." At the October Term, 1908, of the Superior Court of Swain County, and on the 28th day

of October, the respondent and said Heyser filed in that court their petition and bond to remove this cause to the United States Circuit Court for the Western District of North Carolina. The judge presiding found the facts as set forth in the Record, pp. 15 and 16, and denied the motion to remove the case. Subsequently the record appears to have been docketed in the Circuit Court of the United States, and on November 7, 1909, a motion was made by the petitioner to remand the case to the State Court, which motion was denied on November 9, Record pp. 16, 17 and 18. And to the ruling of the judge the petitioner excepted.

The petitioner here insists that the voluntary general appearance by the respondent in the Superior Court of Swain County, North Carolina, was a waiver by the respondent of its right to remove this cause from the State Court and a submission on its part to the jurisdiction of the State Court.

So far as our research has gone this identical question has never been passed upon by this honorable court, but in the opinion delivered in the case of Goldey v. Morning News, 156 U. S., 518, 525, the court used this language, "how far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the State Court, might be considered, *like a general appearance*, as a waiver of any objection of the jurisdiction of the court over the person of the defendant, need not be considered;" a clear intimation on the part of the court, as we understand, that a general voluntary appearance would waive the right to subsequently remove the case. In the same opinion the court says "this (petition filed for removal) was strictly a special appearance for this purpose only, and, whether the attempt to remove should be successful or unsuccessful, could not be treated as submitting the defendant to the jurisdiction of the State Court for any other purpose."

Again in the case of Wabash Western Railway Co. v. Brow, 164 U. S., 271, 279, the court says, "The Circuit Court of Appeals held that a petition to remove, without more, was tantamount to a general appearance, but that this result could be avoided by a special appearance ac-

companying or made part of, the petition, which would not be waived by or be inconsistent with the general appearance because the application was analogous to an objection to jurisdiction over the subject matter."

Again the petitioner insists that after the respondent had entered its general appearance in the State Court, an order was made without objection allowing the petitioner here time within which to file his complaint, and an order made allowing the respondent time within which to file its answer. These orders were made on motion of counsel for each party as found by the Judge of the Superior Court, Record p. 15, findings of fact 4. On this question the decisions of the various Circuit Courts, Circuit Courts of Appeals and State Courts seem to be at utter variance with each other and so far as we have been able to ascertain this particular question has never been passed upon by this honorable court.

The Supreme Court of North Carolina, in the cases of Howard v. Railroad, 122 N. C., 945, and Bryson v. Railroad, 141 N. C., 594, held expressly that such extensions of time to the parties within which to file their pleadings was a waiver on behalf of each defendant of its right to remove its case to the Circuit Court. The same ruling was made in Fox v. Railway Co., in the fourth circuit, 80 Fed., 955. See also

Frinck v. Blackington Co., 80 Fed., 306.
Fidelity Co., v. Newport Co., 70 Fed. 306.
Brigham v. Thompson Co., 50 Fed., 883.
Velie v. Mfg. Co., 40 Fed. 546.
Dixon v. W. U. T. Co., 38 Fed. 377.
Spangler v. Atchison, etc., Railroad Co., 42 Fed., 306.
Pullman Car Co., v. Speck, 113 U. S., 88.
Railroad Co. v. Dougherty, 138 U. S. 298.

On the other hand it has been held by the then Circuit Judge of the Fourth Circuit, in the case of Wilcox, Gibbs Guano Co., v. Phoenix Insurance Co., 60 Fed., 929, that such extension of time on motion of the defendant does not deprive it of the right subsequently to file a petition to remove the case. This decision was followed by Judge H. G. Connor, District Judge of the Fourth Circuit in

the case of Avent v. Deep River Lumber Co., 174 Fed., 298, in which he declares that the Guano Company case just referred to *"in the absence of any decision by the Supreme Court of the United States is controlling authority."* Moon on Removal says, Sec. 156, "the plaintiff may even stipulate that defendant shall have further time to answer without plaintiff thereby consenting that a petition for removal may be filed after the time limited therefor had expired." Again the same author says "the better reason, if not the weight of authority, sustains the theory that the State Court in which the suit is pending cannot, by an order extending the time for the defendant to answer or otherwise, enlarge the time within which a petition for removal may be filed." A great array of cases decided by the Federal Court are cited, p. 446.

The statute of North Carolina, applicable to this subject, Revisal 1905, reads as follows:

"Sec. 466. *Time of filing.* The plaintiff shall file his complaint in the clerk's office on or before the third day of the term to which the action is brought, otherwise the suit may, on motion, be dismissed at the cost of the plaintiff."

"Sec. 473. *Time for.* The defendant shall appear and demur or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default." And section 512 authorized the judge to allow the defendant time within which to file an answer, reply or other pleading.

In this state of the law bearing on this subject the petitioner respectfully insists that a certiorari should issue in this case on account of the conflict of decisions and holdings above referred to.

II.

The petitioner further insists that the writ of certiorari should be issued in this cause for the reason that his Honor, Judge Jas. E. Boyd, who, in the Circuit Court, made an order denying the petitioner's motion to remand the case to the State Court, was incompetent to sit on the trial of this cause even by consent of counsel in the Cir-

cuit Court of Appeals. For this position the petitioner relies upon the following cases:

American Construction Co., v. Railway Co., 148 U. S., 372, 386.

Moran v. Dillingham, 174 U. S., 153.

Consent of counsel that the judge should sit on the hearing of this cause on appeal would not alter the case.

U. S. v. Emholt, 105 U. S., 414.

In the last case it was held that where the District Judge sat in the District Court and decided the case which was appealed to the Circuit Court of Appeals and there the District Judge sat with his Honor, Justice Harlan, on the appeal "and a certificate signed by Mr. Justice Harlan only was entered on the record stating that the hearing, upon special verdict, found in the District Court was, by consent of the parties, had before the Circuit Justice and the District Judge and that they were divided in their opinion," and judgment was entered according to the opinion of Mr. Justice Harlan, the judgment was not one which could be reviewed by the Supreme Court because it could only review a judgment entered by judges competent to sit.

III.

The petitioner's fourth assignment of error raises the question as to jurisdiction of the probate court of Jackson County, North Carolina, upon the filing of the petition therein by William L. Hilliard, Guardian of W. H. Thomas, lunatic, on the 17th day of May, 1880, Record pp. 74 to 79, to sell the real estate of the lunatic for the purposes set forth in the petition.

If the court was without jurisdiction of the cause pending before it its action was, of course, void.

Cooper v. Reynolds, 10 Wall., 308.

Stafford v. Gallops, 123 N. C., 19.

In the case of Cooper v. Reynolds Mr. Justice Miller, in delivering the opinion of this court, says, "by jurisdiction over the subject matter is meant, the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the

court and is to be sought for in the general nature of its powers, or in authority especially conferred."

The statutes of North Carolina bearing on this subject at the time of the filing of this petition may be found in Battle's Revisal, Ch. 57, Secs. 6 and 7, which read as follows:

"6. Whenever it shall appear to any Judge of Probate, by report of the guardian of any idiot or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the parish, the Judge of Probate may make an order for the sale or renting of his personal or real estate, or any part thereof, in such manner and upon such terms as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale, and shall be entered at length on the records of the Court; and all sales and rentings made under the provisions of this section, shall be valid to convey the interest and estate directed to be sold, and the title thereof shall be conveyed by such person as the Court may appoint on confirming the sale; or the Court may direct the guardian to file his petition for such purpose.

"7. Whenever it shall appear to the Court of Probate, upon the petition of the guardian of any idiot or lunatic, that a sale of any part of his real or personal estate is neccessary for his maintenance; or for the discharge of debts unavoidably incurred for his maintenance; or, whenever the Court shall be satisfied that the interest of the idiot or lunatic would be materially and essentially promoted by the sale of any part of such estate; or, whenever any part of his real estate is required for public purposes, the Court may order a sale thereof to be made by such person, in such way and on such terms as it shall adjudge; *Provided, however,* that the Court, if it be deemed proper, may direct to be made parties of such petition the next of kin or presumptive heirs of such nonsane person. And if on the hearing, the Court shall order such sale, the same shall be made and the proceeds applied and secured, shall descend and be distributed, in like manner as is provided for the sale of infants' estate decreed in

like cases to be sold on application for their guardians, as directed in the chapter entitled 'Guardian and Ward.'"

Turning to chapter entitled "Guardian and Ward," it being Ch. 53, Battle's Revisal of North Carolina, the portion applicable to this proceeding is found in Sec. 39, which reads as follows:

"Sec. 39. On application of the guardian by petition, verified upon oath, to the Superior Court, showing that the interest of the ward would be materially promoted by the sale of any part of his estate, real or personal, the proceeding shall be conducted as other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; but no sale shall be made until ordered by the Judge of the Court, nor shall the same be valid, nor any conveyance or title made, unless confirmed and directed by the Judge , and the proceeds of sale shall be exclusively applied and secured to such purposes and on such trusts as the Judge shall specify."

From this it is seen that the jurisdiction of the Probate Court over the property of a lunatic extended, by virtue of Sec. 6 just quoted, only to the sale or renting of his personal property or real estate for the support of the lunatic, and by virtue of Sec. 7 the jurisdiction extended to the sale of the real estate of the lunatic only for his necessary maintenance and for the discharge of debts unavoidably incurred for his maintenance. The Probate Court being one of special and limited jurisdiction it had no power except that conferred by statute.

Sutton v. Schonwald, 86 N. C., 198.
Blake v. Repass, 77 N. C., 193, 195.
Freeman on Void Judicial Sales, p. 54, Sec. 11; p. 39, Sec. 9; p. 18, Sec. 4A.

In Sutton v. Schonwald, 86 N. C., 198, the Supreme Court of North Carolina says: "The plaintiff's counsel indeed insisted that in this state the power of the Court of Equity to sell the lands of an infant at the instance of

his guardian, was a special one, and wholly derived from the statute of 1827 (Rev. Code, Ch. 54, 32), and that unless every requirement of that statute was strictly complied with, no attempted sale of an infant's lands could be valid; that in such case it would be an act void, because done wholly without authority, and not one irregularly done within the scope of the Court's authority.

"If the premises assumed by counsel be true, then certainly his conclusion is correct. For all the authorities agree in saying that those powers which are created and conferred specially by statute are to be strictly construed, and whatever formalities are prescribed must be punctually fulfilled, as the Courts have no power to dispense with the requirements of a statute, and most especially in this principle rigidly adhered to, in the case of judicial and probate sales. Freeman on Void Judicial Sales, p. 53; Leary v. Fletcher, 1 Ired., 259."

In Blake v. Repass, 77 N. C., 193, 195, the same Court says:

"Thus in England by the grant of the King, the Court of Chancery acquired exclusive, original, and final jurisdiction over the person and property of lunatics. Our Courts of Equity in this State succeed to these chancery powers and still retain them, except in so far as, and to the extent only as, they have been given to other courts by statute. Prior to the Code of Civil Procedure, a part of this jurisdiction over lunatics, was conferred upon the County Courts, Rev. Code, Ch. 57, 1-5; and the residue was still retained by the Court of Equity. Same chapter, Section 5, *et seq.* By the C. C. P. and acts subsequent thereto, the former County Court jurisdiction and a farther part of the Equity jurisdiction are conferred upon the Court of Probate established by the new Constitution in 1868, Bat. Rev. Ch. 57. But the Court of Probate being a Court of special and limited jurisdiction, all powers not specially conferred upon it, are retained by the Superior Courts, which are Courts of general jurisdiction. While very extensive powers over lunatics and their estates as to the sale of their personal effects for their support and for the payments of *debts necessarily incurred for their maintenance* (Bat. Rev. Ch. 57, 7), are vested in the Court

of Probate, the power is nowhere conferred upon it to provide for the payment of debts incurred prior to the lunacy, nor is any jurisdiction given to entertain an action original or supplementary, by such creditor."

In Freeman on Void Judicial Sales, Sec. 11, we find this statement, page 54: "The statutes of each State designate the contingencies in which the real estate of a deceased or incompetent person may be ordered to be sold. The Probate Courts have no power to license a sale in the absence of these contingencies. The statutes prescribe the limit of the judicial authority. Action beyond this limit is not irregular or erroneous merely—it is non-judicial. If the causes of sale designated by statute are too few, relief must be sought from the legislature. An order of sale made to accomplish a purpose not sanctioned by statute, or based upon a necessity not recognized by statute, is, in legal effect, *coram non judice*. It cannot justify a sale made in pursuance of its directions."

The Probate Court is one of a very limited jurisdiction and in McCauley v. McCaulev. 122 N. C., 288, 292, the Supreme Court of North Carolina said:

"If such a judgment as this could be rendered, it must be done by a Court of Equity or a Court having equitable jurisdiction, when all the parties are properly before it, and not then unless the matters of equity are properly pleaded before the Court.

"But the clerk is a court of very limited jurisdiction—only having such jurisdiction as is given by statute. It has no common law jurisdiction, nor does it have any equitable jurisdiction. Bragg v. Lyon, 93 N. C., 151; Code, Sections 1903 and 1904. The clerk had no power to render a personal judgment against the defendant Williams and declare it a lien on her land. And such a judgment is absolutely void and may be so declared at any time. Freeman on Judgments, Section 120. This is bound to be so on principle. A judgment rendered by a court having no jurisdiction is no judgment. It is absolutely void, and any execution issued on it is void, and gives no force or validity to acts of the sheriff done thereunder."

2. The petition before the Probate Court set forth

several reasons for asking a sale of the property of the lunatic:

First. Insufficiency of income to pay taxes and expenses of litigation.

Second. Debts created prior to the inquisition of lunacy amounting to many thousands of dollars, and willingness of creditors to accept bond, or part payment in cash on settlement.

Third. Expenses in suits and litigation concerning the property.

Fourth. Debts created for the support and maintenance of the lunatic and education and support of the lunatic's infant children.

Record, pages 74-79.

On this petition the Court assumed jurisdiction, and proceded to act, finding facts in regard to the lunatic's estate, his indebtedness, and amounts necessary for his maintenance. The debts were found to be more than $24,000, created prior to lunacy. Indebtedness created for the costs of litigation, fees, commissions, support of lunatic and his children, $2,450. Amount necessary to support the lunatic, $400 per annum. Amount necessary to support each of two minor children, $300 per annum. Amount necessary to carry on the litigation in behalf of the lunatic, $1,000 to $1,200 per annum.

Record, pages 80-82.

On these findings of fact the Court made a general order, Record, pp. 82-83, appointing a commissioner and directing him "to make a sale of the lands belonging to the lunatic, selling first such as may be discovered not to be included in the above named Johnston Judgment Lien, and not involved in litigation and as may be most available and from time to time such lands as are included in the Johnston Judgment Lien and which may be discharged therefrom, either by payment of the said judgment or by re-conveyance of the said Johnston until he shall realize the sum of $17,250. And to this end it is ordered and adjudged that the said commissioner, James W. Terrell, sell such lands at private sale on the terms, one-fourth cash at the time of sale, and the balance in one and two years equal installments, with interest from date,

and that he report semi-annually the amount of such sales, to whom sold, at what date, the particular tracts sold, and the amount received."

Clearly, under the sections of Battle's Revisal above quoted, the Court had no jurisdiction to order the sale of the lunatic's lands for the payment of his debts, contracted prior to lunacy, or for costs, expenses and fees of litigation already expended, or for the costs, expenses, and fees of litigation and taxes subsequently accruing, or for the expense of the future maintenance of the lunatic's family. The only jurisdiction the Probate Court had was to sell the lands of the lunatic, as provided by Sections 6 and 7, for the support of the lunatic and for the discharge of debts unavoidably incurred for his maintenance.

There is no specific allegation in the petition or finding of fact as to how much debt had been incurred at the date of the petition for the support of the lunatic, Record, page 81, par. 10, and paragraphs 10 and 11 of the petition, Record, pp. 75 and 76, leave the matter entirely unsettled. The fact that there was included in the petition some amount of indebtedness contracted by the guardian for the maintenance of the lunatic, does not cure the defect in the jurisdiction of the Court. Such were the facts in the case of Smith v. Pitkin, where the Supreme Court of North Carolina decided that if the Court below had not stricken from the petition all debts prior to the lunacy the proceeding would have been void and would have been dismissed if requested.

Smith v. Pitkin, 79 N. C., p. 569.

After reading this petition it is too clear for argument that the main purpose of the proceeding was to subject the land of the lunatic to sale for the payment of his debts contracted prior to lunacy, for the payment of costs and expenses of litigation and for other purposes not covered by the statute. The Court finds as a fact that it will cost $400 a year to support the lunatic, $600 a year to support the minor children, $1,200 a year to prosecute law suits and pay other expenses and directs the payment of $2,450, previously incurred, for fees, commissions, expenses, for the support of the lunatic and his infant chil-

dren and the setting aside of $5,000 for the future support of the lunatic, and then directs a sale of all the lands of the intestate, amounting to 40,000 acres. The Superior Court in Equity was the only Court of North Carolina which had jurisdiction to make such an order as that set out in this proceeding, and the Supreme Court of North Carolina has expressly so declared as to this proceeding and as to debts mentioned in this very petition.

Adams v. Thomas, 83 N. C., 521;
Adams v. Thomas, 81 N. C., 296.

3. It appears also from the report of the commissioner, Record pp. 86-93, that none of the funds derived from the sale of lands, which amounted to $9,829.99, were paid to the guardian of the lunatic except the paltry sums of $100 on November 3, 1883, Record, p. 91, and $100 May 25, 1885, Record, p. 92. The fact that provision is made in the proceeding for the maintenance of the lunatic could not have given the Court jurisdiction to make such an order. No one can tell from this order whether the lands sold were actually sold to support the lunatic or for the other purposes, but it appears from the report of the commissioner above referred to, *that the funds were used for other purposes and approved by the Court, April* 1, 1885, *Record, p.* 93, long after the sales which must therefore have been made for the purposes for which the funds were used.

The Probate Court had jurisdiction only to sell so much of the land of the lunatic as was necessary for his maintenance, and to pay debts necessarily contracted for that purpose, and in order to sustain the jurisdiction of the Court even in this respect, it would be necessary for the Court to find first how much of the land itself it was necessary to sell for this purpose. This is necessarily so in that there is no presumption in favor of the jurisdiction of this Court, and in order to sustain its jurisdiction the essentials must appear upon the face of the Record. It only appears upon the face of this Record, that the Court exceeded its jurisdiction, and there is no presumption that the Court confined itself to the question of providing maintenance for the lunatic—in fact, the Record clearly shows that it did not. There was no attempt made to set aside a maintenance for the lunatic in his property as it then existed, but the whole of his property was directed to

be turned into money for the declared purpose of paying the debts contracted prior to the lunacy with the further direction that out of this money a small portion be applied to the maintenance of the lunatic.

4. To allow the Probate Court, being a court of special and limited jurisdiction, to acquire jurisdiction of matters beyond its power, by tacking on to its demands a demand for the lunatic's support, would be a fraud on the jurisdiction of the Superior Court and would enable the Probate Court to usurp the rights of the Superior Court and destroy its very existence. It is only necessary to state this proposition in order to show the want of jurisdiction in the Probate Court over the subject-matter in the special proceeding entitled, "In Re Thomas," above referred to. Doubtless this was in the mind of the Supreme Court of North Carolina when it decided the case of Smith v. Pitkin, *supra*. The Probate Court certainly exceeded its authority and there being no method by which the valid can be distinguished from the invalid, the whole proceding is void.

Where the court had jurisdiction of part of the causes of action set up in the pleadings and not of the whole but proceeded as to the whole its entire action had been held to be void in all cases where there could be no severance of the valid from the invalid.

Wakefield v. Campbell, Am. Dec., 60;
Litchfield v. Cudworth, 15 Pick., 23, 31-32;
Peters v. Peters, 8 Cush., 529, 543;
Jenks v. Howland, 3 Gray, 536, 537;
Pierce v. Prexcott, 128 Mass., 140, 143.

Where a court exceeds its jurisdiction in rendering a judgment the judgment is void.

Branch v. Houston, 44 N. C., 85.

The cases of McCauley v. McCauley, 122 N.C., 288, and of McCauley v. Williams, 122 N. C., 293, are apt and clear illustrations in affirmance of the doctrine herein contended for. In these cases a special proceeding, of which the court had jurisdiction, had been pending before the Clerk of the Superior Court to sell land to make assets to pay debts. In this proceeding, by consent of parties, commissioners were appointed to ascertain what amount Nancy

McCauley, widow of the plaintiff's intestate, was entitled to as a yearly support and what part of this sum each of the children and heirs at law should pay, this order having been made by a judge of the Superior Court at term time to which the proceeding had been transferred. Subsequently upon a finding of the amount necessary to support the widow, on motion of her counsel in the same cause, the Clerk of the Court, to whom the case had been remanded, entered judgment against each of the children of the intestate for a specific amount to be paid annually to the widow for her support. The Supreme Court, when these judgments were attacked, directly in the first case and collaterally in the second case, held that the judgments were void because the Clerk of the Court (the Probate Court) had no power to render a personal judgment against any of the children or heirs at law of the intestate.

IV.

The jurisdiction possessed by the court in the probate proceeding was not exercised according to law, hence if the court would have had jurisdiction on the subject matter under a proper proceeding it acquired no such jurisdiction here as to pass title to the trees in dispute to the persons under whom the defendant claims, because:

1. The petition fails to describe any particular property.

> Freeman on Void Judicial Sales, Sec. 11;
> Verry v. McClellan, 6 Gray, 535.

2. There was no description of the trees claimed in the case, hence they could not be sold or transferred.

3. There was no description of any of the rights of way claimed to enable the purchaser to remove the trees in question.

4. There was no order to sell trees on any particular tract or tracts of land or to sell trees in any form, and no order to sell the timber interest or a portion of the timber interest in any tract of land and such a sale must have been absolutely without authority.

5. There was no report of the sale of the trees claimed in this case and nothing in the proceeding identifying the

trees reported as sold with the rights and with the trees claimed in this case.

6. The order of sale did not "specify, particularly the property to be thus disposed of," Bat. Rev. Ch. 57, Sec. 6, and was, therefore, void as has been frequently held by the Supreme Court of North Carolina.

Leary v. Fletcher, 23 N. C., 259, 261;
Spruill v. Davenport, 48 N. C., 44;
Coffield v. McLean, 49 N. C., 15;
Duckett v. Skinner, 33 N. C., 431;
Jennings v. Stafford, 23 N. C., 404, 407;
Overton v. Cranford, 52 N. C., 415, 417.

In Leary v. Fletcher, *supra*, the Court in discussing an order of sale which did not "particularly specify what property may be sold" as required by the statute, said:

"It is obvious that the legislature intended, and therefore we hold that the legislature required, that the judgment of the Court should be exercised in deciding whether there were any debt or demand against the estate of the ward to render a sale of his property expedient—and if so, then in selecting the part or parts of his property, which could be disposed of with least injury to the ward. The order before us manifestly departs from both these requisitions. If valid, it authorizes the guardian to sell any part he pleases of the ward's land, which he may deem necessary for the payment of debts against her father's estate. The Court, instead of exercising its own discretion on the subjects, whereupon the legislature required it to act, has undertaken to delegate that discretion to the guardian. This cannot legally be done. *Delegatus non protest delegare.*"

And in the case of Duckett v. Skinner, *supra*, the Court held void an order made by the County Court in the following words, "ordered that he, the said William Blunt, guardian, sell the land of said deceased Thomas Harvey, or so much thereof as will be sufficient to discharge the debts." The case of Leary v. Fletcher expressly affirmed.

In the case of Spruill v. Davenport, 48 N. C., 42, the petition of the guardian in the County Court alleged that there were debts against the wards amounting to four hundred dollars or thereabouts, that there was no per-

sonal property but six or seven hundred acres of land liable thereto and prayed that "an order to sell one hundred acres of land adjoining the lands of Elias Oliver's heirs, et al., it being the eastern part of said tract of six or seven hundred acres, more or less, sufficient to satisfy the claims against his said wards." The prayer of the petition was granted and sale of the land in controversy was made, reported and duly confirmed but the Supreme Court held in a case wherein the title was collaterally attacked that the sale was void. In that case Leary v. Fletcher is expressly affirmed and the Court says:

"Nor is the land ordered to be sold, designated with sufficient certainty; one hundred acres *more or less*, without any definite boundaries, is a description giving a greater latitude to the guardian than was intended by the legislature.

"Upon the whole, then, we may say, that the order, if valid, 'authorizes the guardian to sell any part he pleases of the ward's land, which he may deem necessary for the payment of debts against the father's estate. The Court instead of exercising its own discretion on the subjects, whereon the legislature required it to act, has undertaken to delegate that discretion to the guardian. This cannot legally be done; *delegatus non protest delegare.*' "

The case of Jennings v. Stafford, 23 N. C., No. 404, 407, the Court says:

"The case of *Leary and wife v. Fletcher,* decided at the last term (*ante, p.* 259), is not an authority for the plaintiff. That was determined upon the ground that the County Court had passed an order, which by law *it could not make.* Having a special and limited authority to direct the sale of specific parts of an orphan's estate to meet ascertained debts, the Court had undertaken to authorize the guardian to sell all or any part thereof *he* might elect, to meet undefined debts. The act was one wholly without authority, and not an act erroneously or irregularly done within the scope of authority."

Again in the case of Overton v. Cranford, 52 N. C., 415, 417, we find this language:

"In *Doe v. Fletcher,* the decree, or order of sale, which constituted the sheriff's warrant, was contrary to the re-

quirements of the law in this: no particular property was *specified*, but the sheriff required to sell *so much as might be sufficient*, whereas, the law requires the Court to designate. The order upon its face, was outside of the Court's power, and was subsequently void."

The Circuit Court of Appeals, we respectfully insist, were in error in holding that the proceeding above referred to was valid and substantially in compliance with Sec. 7, Ch. 57, Battle's Revisal of North Carolina. As a matter of fact it appears to us that there was no intention or effort to follow the procedue set out in Sec. 7 for the reason that under Sec. 7, in order to make any sale valid it was necessary for the proceeding to conform to that referred to in said section and entitled the chapter "Guardian and Ward," which is Ch. 53 of said Revisal. Turning to this Ch. 53, Sec. 39, which applies to such proceedings, we find the following language, "but no sale shall be made until ordered by the judge of the court nor shall the same be valid nor any conveyance of title made unless confirmed and directed by the judge."

In the Hilliard proceeding, hereinbefore referred to, there was no order of sale made by the judge of the court and no sale or conveyance confirmed or directed by the judge. In the absence of such orders by the judge it is plain that no lawful sale could be made, as the court having the matter in charge was one of special limited jurisdiction and could exercise no power beyond that expressly conferred upon it.

V.

1. Assignments of Error Nos. 15, 16, 17, and 18, it is insisted, should be sustained, because, as shown above, the Probate Court, in the original proceeding, had no jurisdiction to make the order of sale of the lunatic's property. The proceeding on the petition filed by James R. Thomas, guardian of William H. Thomas, lunatic, on the 31st day of December, 1898, could in no way affect the rights of the complainant to the property in controversy in this case. If it should be found that this proceeding was sufficient to supply any lack of jurisdiction in the Probate Court in the original proceeding, such could not

affect the result of this case, because in the petition of J. R. Thomas, guardian, filed the 31st day of December, 1898, and in the orders made in said case prior to 1903, *there is absolutely no reference of any kind whatsoever to the alleged sale of the trees in controversy in this case.* There is no pleading on which to refer such a matter or upon which to base an adjudication of the Court on the subject which would have been necessary had there been a purpose to confirm such sale (Mill saps v. Estes, 137 N. C., 535). The title of the complaint passed out of the heirs of William H. Thomas, lunatic, by deed dated the 18th day of April, 1903, and the matter of the sale of any trees by Terrell, commissioner, is nowhere brought up or referred to until two years afterwards when a reference thereto is put into the report of the referees appointed to state an account between Terrell, commissioner, and the guardian of William H. Thomas, lunatic, and his heirs, which report was filed on the 26th day of February, 1905. To say that the filing of such report based on the petition in that case and on the order of reference in the case would be binding on persons who had bought the property and paid for it, taking a deed therefor two years prior to the filing of this report seems to us to be unworthy of argument. Besides, if the Probate Court originally had no jurisdiction to make a sale of the property referred to, as herein insisted, then there would have been no jurisdiction to confirm such report in the same proceeding in the same Court under a different name, that is in the Superior Court before the Clerk where the proceedings were had on the petition filed on the 31st day of December, 1898, Record p. 98. The fact that by consent that proceeding was carried before the Judge at Chambers who had the power to review the orders of the Clerk in the premises would not cure any defect of jurisdiction in the Probate Court.

V.

1. Assignments of Error Nos. 5 to 14, inclusive, are addressed to the contention of the complainant, petitoner here, that even if the Probate Court, on the petition of William L. Hilliard, guardian, filed on the 14th day of

May, 1880, had jurisdiction or would have had jurisdiction had proper allegations been made to sell the property of the lunatic for the purposes set forth in the petition, then such jurisdiction did not attach in this case, and was not exercised according to the course and practice of the Court, but that the proceeding was so defective as to constitute notice to no one and was void for all purposes. The provision of the statute, Battle's Revisal, Ch. 57, Secs. 6 and 7, are totally disregarded. In the first place there are no sufficiently specific allegations in the petition to justify such an order of the Court. The order does not "specify particularly the property thus to be disposed of, with the terms of renting or sale." There is no order to sell trees. It does not seem to be contended by counsel that the proceeding was conducted under Section 7 of Battle's Revisal, as there was no attempt to follow the practice as directed by the chapter entitled, "Guardian and Ward." There was no confirmation of any of the proceedings by the Judge of the Court, and the Judge made no order for the sale as provided by Section 39, Ch. 53, Battle's Revisal. There is no particular description of any land mentioned in the petition, but the lands of the lunatic are referred to as many small tracts lying in the counties of Clay, Cherokee, Graham, Haywood, Jackson, Macon and Swain. The findings of fact and order of sale made upon the petition are still more indefinite as to what land shall be sold, but refer to the same lands in the various counties containing 40,000 acres and directs the commissioner to make a report of his sales to the court semi-annually, Record pp. 74-83. There is no proper report by the commissioner of the sale of the lands. *In any event there is no report by the commisisoner of the sale of standing trees on any tract or tracts of lands to Loomis and Wheeeler, or either of them, nor any report of the sale of standing trees on any tract of land whatsoever.* The only reference in the report to what may possibly be the property in controversy, is this, Record, p. 85, "sold trees in 1883, $1,129.60; sold trees in 1884, $1,052.90." On page 86, in recapitulation in the account, the commissioner reports, "total cash on sale of trees. $2,181.23." And in the record of disbursements, Record, page 90, will be found at the date of August 7th, 1883, this entry, "spent the month in

Swain, surveying land and selling and marking trees, and on September 10th, paid D. Lester, as per account and receipt, $100.64;" and on the same page this entry, "August 30, 1883, paid sundry parties for marking trees in Swain, $21.35." These are the only references to trees in the entire proceeding, and there is no reference or description of any trees sold to Loomis and Wheeler.

2. Looking at the report one would naturally suppose that the trees sold had been cut down and removed from the land. *There is no statement that the commissioner had sold trees standing on the land with the right to the purchaser to go on the land at any time he saw fit and cut and remove the trees.* But the deeds under which defendant claims grant such right in fee simple, thus going far beyond any authority given by a confirmation of a sale of trees.

3. Suppose that in looking at this report when it was filed on the 8th day of April, 1885, the guardian of the lunatic or any person in his behalf had desired to object and except to the sale of any such property as that in controversy in this case and purported to be transferred by the deeds of the commissioner, Record, pp. 116-121, how could this report have given such person sufficient information to enable him to object to the proceeding of the commissioner? No one could contend that it would. Again, how could anyone know on this report what trees the commissioner had sold or upon what land he had sold trees? If such a report is sufficient, then it may be for all anyone can now see, that under this report of "trees sold" the commissioner sold every tree, living and dead, upon the whole 40,000 acres of land which belonged to the lunatic, situated in the counties of Clay, Cherokee, Graham, Haywood, Jackson and Swain, in the State of North Carolina. If such report of sale is sufficient to include the trees in controversy in this action, then it would undoubtedly be sufficient to cover every tree standing on every tract of land owned by the lunatic, and a further investigation may develop the fact that in this meager report every living tree on the lands of the lunatic was disposed of. Can anyone with reason say that the petition in this case, the order of sale entered herein, the report of sale referred to in the Record and the confirmation by the

Clerk of the Court, April 1st, 1885, is sufficient for such a purpose? If that proceeding may be sustained then it should no longer be said "the courts are guardians of the lunatics."

The failure of adequate description in the petition, the absence of an order to sell trees, the indefinite report of sale and the meager order of confirmation renders the whole proceeding so defective as to be void on its face.

Leary v. Fletcher, 23 N. C., 261.
Spruill v. Davenport, 48 N. C., 44;
Freeman on Void Judicial Sales, page 58, Sec. 11; Sec. 4A.
Millsaps v. Estes, 137 N. C., 535;
Coffield v. McLean, 49 N. C., 15;
Duckett v. Skinner, 33 N. C., 431;
Jennings v. Stafford, 23 N. C., 404, 407;
Overton v. Crawford, 52 N. C., 415, 417;
Reynolds v. Stockton, 140 U. S., 254.
Rover on Judicial Sales, Sec. 60.

A confirmation of sale made without authority previously given is void.

Shriver v. Lynn, 2 How., 43.

Defendant claims under this proceeding 7,675 trees at a cost of less than 30 cents each and how many more thousands, *it only knows.*

4. "A mandatory record is essential to invest the Court with jurisdiction to enter a judgment, and is always and forever essential to protect it from collateral attack, or to evince the proceedings as *coram judice.*"

Hughes on Procedure, pp. 583, 775, 722;
Windsor v. McVeigh, 93 U. S., 274.

The mandatory record can neither be waived, construed away, nor dispensed with, nor disregarded, and must evince the fact that the parties and subject-matter were tested with judicial fairness and in accordance with fundamental rights.

Windsor v. McVeigh, *supra.*

5. The decree must describe the property to be sold and specify in certain and precise language the duties to

be performed by the officer, and an order to sell the particular property is essential.

24 Cyc. p. 9, Sec. A.
24 Cyc. p. 10, Sec. B.
Shriver v. Lynn, 2 How., 43;
Freeman on Void Judicial Sales, Sec. 20.

6. To make the sale legal, the officer conducting the sale must report the sale, showing the notice of sale, the price received, how much and what land was sold, whether separate tracts were sold, together or not, and what each tract brought.

24 Cyc., p. 32, par. A. and B.;
Shriver v. Lynn, 2 How. 43.

7. The confirmation is the formal expression of the judicial sanction of the sale and is therefore necessary for its completion. The accepted bidder is only a preferred purchaser and to divest the owner's title and render VALID THE DEED TO THE PURCHASER, THE SALE MUST BE CONFIRMED.

24 Cyc., p. 33, Sec. A.;
Foushee v. Dunham, 84 N. C., 56;
Miller v. Fetzer, 82 N. C., 194;
Dula v. Seigle, 98 N. C., 460.

8. In order that there may be a valid confirmation, the commissioner making the sale must report to the Court particularly what he has done—that he has complied in making the sale with the order of the Court—stating particularly what land he has sold, and especially in the case now pending where the order of the Court required the commissioner to report what particular lands he had sold, the price bid, the terms of sale, and show that the price was a fair price for the lands so sold. Upon that report it is the duty of the Court to make an adjudication, in order to divest the owner of the title to the land so sold, and until such sale is approved and confirmed by the Court, the purchaser acquires no title whatsoever.

Granting for the sake of argument, that the confirmation of the commissioner's report is sufficient to confirm the sales reported therein, it did not pretend to confirm the sale of any trees to anybody and there is no report of a sale of trees so made. Especially could it not be

considered as confirming the sale herein questioned, as neither the trees or the land on which they stand, nor the purchasers, are mentioned in said report.

Reynolds v. Stockton, 140 U. S., 254.

The next question presented on the face of the record of this proceeding is as to whether or not the Probate Court had jurisdiction to direct a severance of the trees from the lands and the sale thereof separate from the fee, and also, even if the Court did have such jurisdiction, did the order made in this proceeding authorize the commissioner to sell the same?

The statute herein questioned authorizes the Court to sell land of the lunatic, and it is to be presumed that the legislature, in using the word "land" in the statute, intended that it should be given its usual meaning, and while the Court might, under this statute, have had authority to authorize the sale of all the interest which the lunatic had in any particular parcel of land, certainly the statute could not be made, by implication, to cover a case where this Court of limited jurisdiction undertakes to carve out of the fee simple title held by the lunatic a separate and distinct estate. It would hardly be contended that this statute conferred a jurisdiction upon the Court to sell an undivided interest in the land, or to mortgage it for the purpose of raising money, and with no more reason can it be contended that it authorizes this inferior court to place a perpetual cloud on the fee of the lunatic by conveying for a nominal sum to a stranger the right, whenever he pleases, to enter upon the land and remove therefrom parts of the timber.

Freeman on Void Judicial Sales, p. 129, Sec. 36.

9. The policy of the law for ages has been against the severance of the trees from the fee and the creation of a separate and distinct title in fee to standing timber, the Court's full jurisdiction having gone no further than that such conveyances are contracts for the removal of the timber, some of them holding that the title to the timber vests, by virtue of the conveyances, in the grantee, but that it is subject to the implied condition that it be removed within a reasonable time; other jurisdictions taking the view that title to real estate is not involved and

such a conveyance is a conversion of the trees into personal property. The courts of North Carolina have adopted the first rule, but, certainly, the Legislature of North Carolina would not be presumed to have intended to authorize a Court of inferior jurisdiction to carve out of the estate of minors and lunatics such conditional fees by merely authorizing such courts to sell the land of such lunatics and minors. In fact, that such was not the intention of the Legislature is clearly shown by the fact that that they deem it necessary to specially authorize the guardians of minors to sell standing timber under certain conditions, but nowhere is this authority given to the guardian of a lunatic or to the Probate Court as to the estate of lunatics.

Battle's Revisal, Chap. 53, Sec. 33.

Even this section does not authorize the conveyance of the fee in the trees, but clearly contemplates merely the sale and removal of the timber. The same reasoning would apply in construing the order of the Court, as that applied to the construction of the statute, and certainly the commissioner could not exceed the authority given him in the order.

For the foregoing reason, the plaintiff contends that the Probate Court had no jurisdiction to authorize the sales in question. The defendants, however, impliedly admit this and rely upon the fact that the confirmation of the sale by the clerk cures such defect, and further that the proceeding was afterwards transferred to the Superior Court and there confirmed by the judge. As to this, the plaintiff contends, first, that the sale in question was never reported, and therefore never confirmed, but, admitting for the sake of the argument, and for that alone, that it was, the confirmation would merely cure the irregularities, and it would seem unnecessary to cite to this Court authority for the proposition that the confirmation of a void sale will never in any case render such sale valid, and there can be no doubt, in case the Probate Court had no jurisdiction, that all of its orders and proceedings pursuant thereto were absolutely void and could not be cured by the confirmation of any court.

10. A contention that the proceedings on the petition

dated December 31st, 1898, pp. 98-114, operated to validate the alleged sale of trees cannot be sustained because:

1st. The petition makes no reference to such sale, pp. 98-102.

2d. No such question was referred to the referees, p. 106.

3d. The report of the referees does not specify the lands upon which the trees alleged to have been sold stood, and no mention is made of the sale of trees on the lands described in this record, page 111.

It has been expressly decided by the Supreme Court of North Carolina, which decision is in accordance with the rulings of all courts, that in order to give jurisdiction to render a judgment there must be a pleading broad enough to justify the judgment.

McCauley v. McCauley, 122 N. C., 288;
Windsor v. McVeigh, 93 U. S., 274-282;
Hughes on Procedure, pp. 722-723.

VI.

It is contended on the part of purchasers from Terrell, commissioner, and those claiming under them that they were purchasers of the property without notice. The many defects, irregularities and failure of jurisdiction of the Court for the reasons hereinbefore set forth would not avail them, because they were fixed with notice of all defects appearing in the record under which they claim title and where a record is so defective and is so clearly insufficient as in this case a purchaser cannot complain that he loses his purchase money. A good illustration of this doctrine is found in the case of Millsaps v. Estes, 137 N. C., 535, 544-545.

VII.

The complainant's 28th assignment of error should undoubtedly be sustained. The defendant in its answer, Record, page 33, and on the admitted facts in this case, the defendant or those under whom it claims had prior to the beginning of this suit, removed a large number of

the trees described and referred to in the deeds under which the defendant claims the same, whereas said decree adjudged that the defendant was still owner of said trees on said land and had the right to enter the same and take therefrom the same number of trees which were described in the said deeds under which the defendant claims the same.

For the causes herein set out the petitioner prays this Honorable Court to issue its writ of certiorari to review the decree of the Court of Appeals.

December 1st, 1910.

J. H. TUCKER,
JULIUS C. MARTIN,
Counsel for Petitioner.

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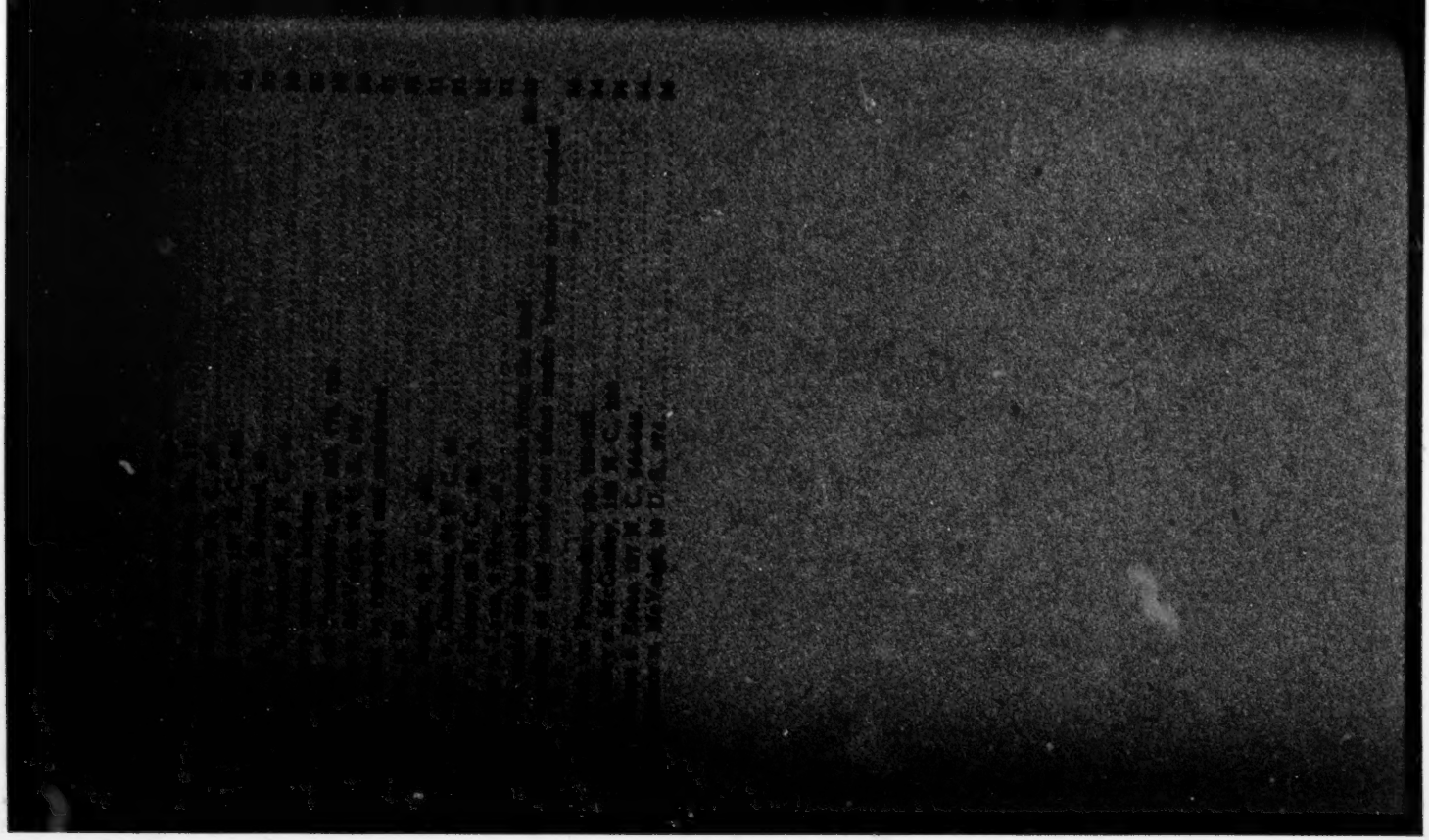
STATEMENT OF FACTS.



SUPREME COURT OF THE UNITED STATES.

October Term, 1912.

No. 188.

C. H. REXFORD, Petitioner,

vs.

BRUNSWICK-BALKE-COLLENDER COMPANY.

On Writ of Certiorari to the Circuit Court of Appeals For the Fourth Circuit.

BRIEF AND ARGUMENT FOR PETITIONER, C. H. REXFORD.

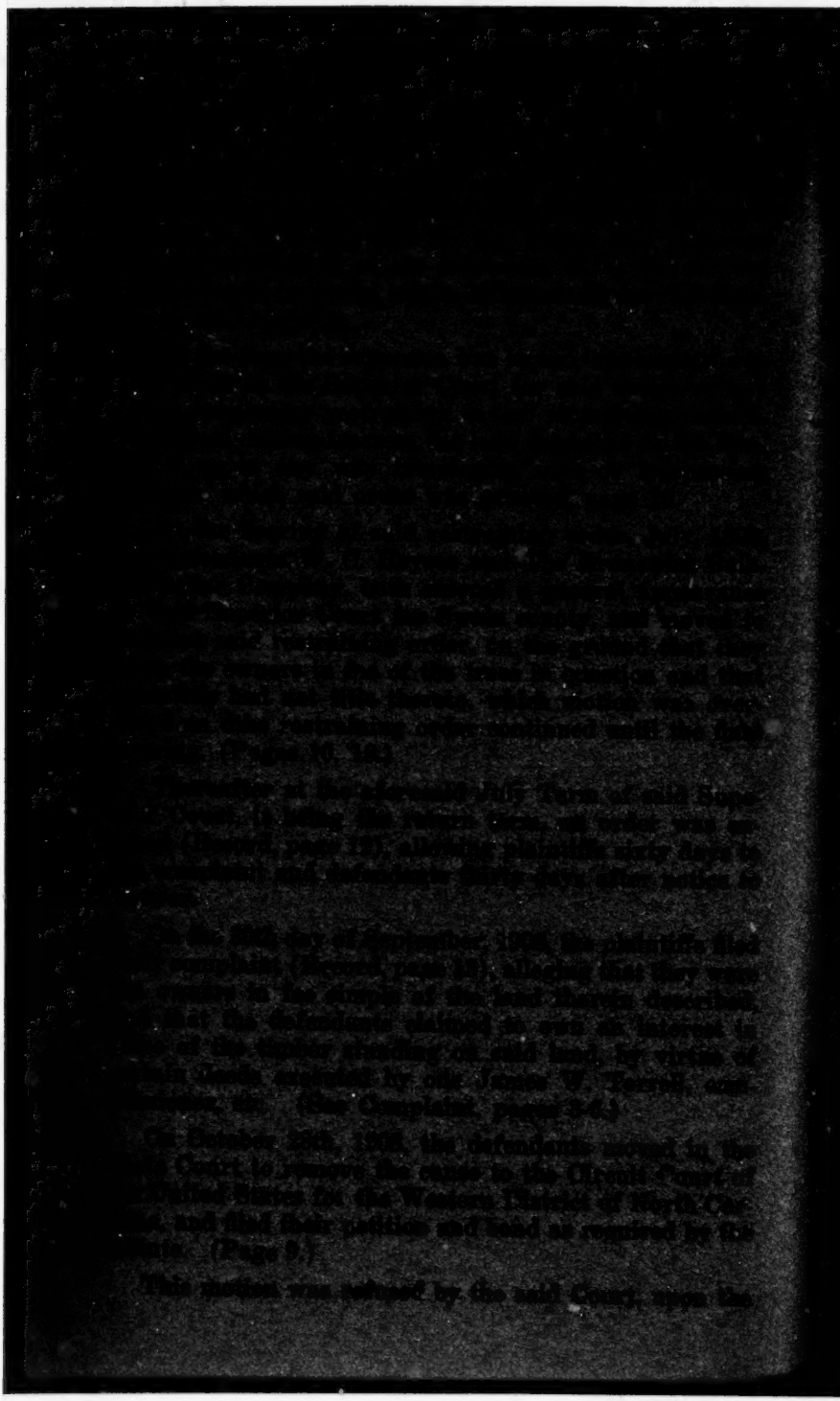
STATEMENT OF FACTS.

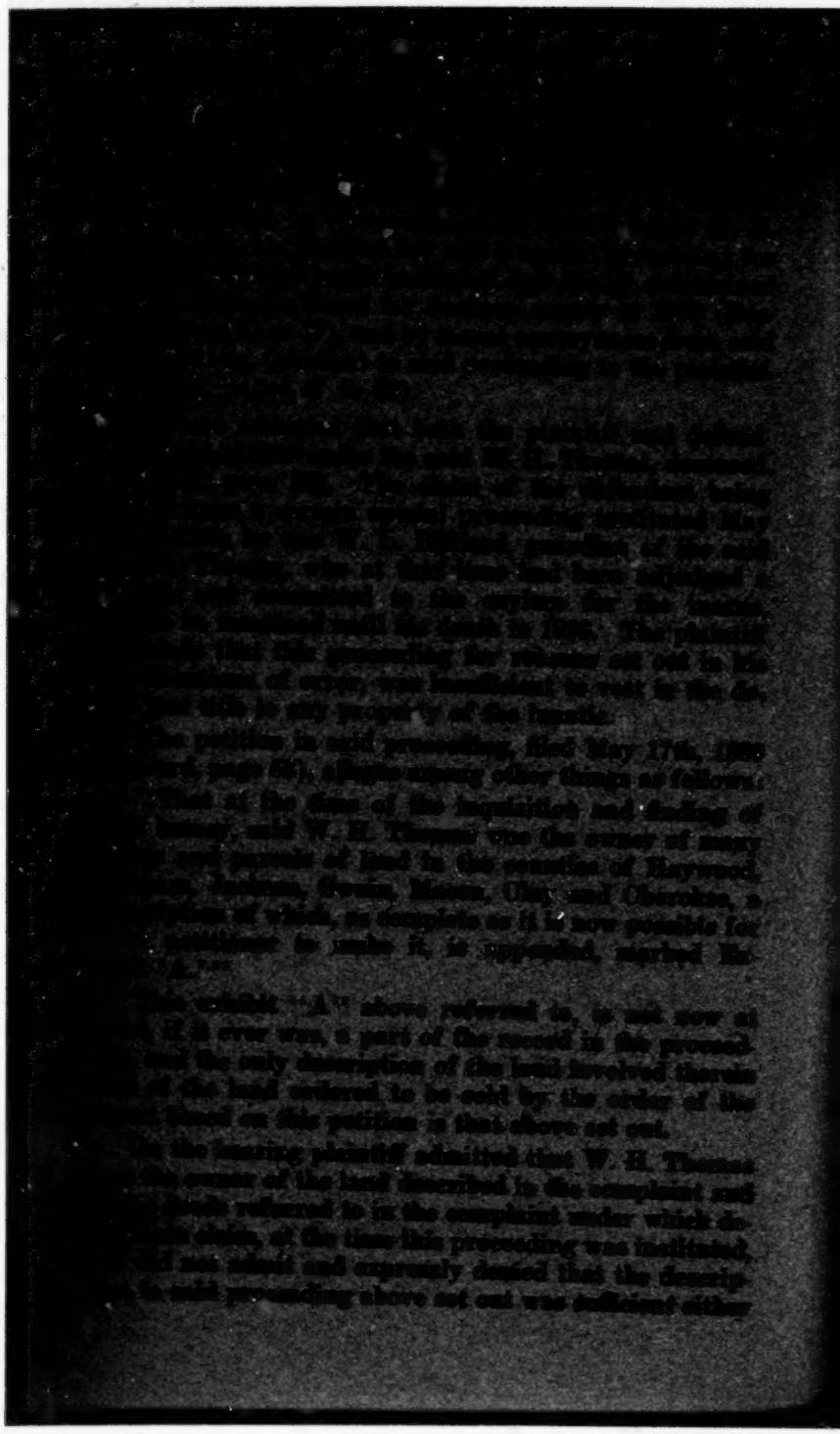
This is an action instituted by C. H. Rexford, petitioner, in the Superior Court for the county of Swain, in North Carolina, to determine an adverse claim set up by the defendant to certain trees standing on lands described in the complaint belonging to C. H. Rexford.

The action having been instituted under Section 1589 of the Revisal of 1905 of North Carolina, which provides in so far as it is material to this case, as follows:

"An action may be brought by any person against one who claims an estate or interest in real property, adverse to him for the purpose of determining such adverse claim. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff can recover no costs."

The summons (Record, page 2), issued June 9th, 1908,





[illegible]

[illegible] (Record, page 66), that

"The commissioner appointed by this Court may be full authority (after provision is made for lunatic's support and maintenance and that of his infant children as well as for costs by setting aside a sum for that purpose) to arrange and pay off all said indebtedness either by sale of such part of the remaining estate as may be [illegible] etc."

Based on this petition the probate Court of Jackson county entered the order of sale set out in the record (Record, page 67), providing as follows (Record, page 70):

"It is ordered that James W. Terrell, of the county of Jackson, be appointed commissioner to make sale of the lands belonging to the said lunatic, selling first such as may be discovered not to be included in said above mentioned Johnston judgment, etc."

"7th. It is ordered and adjudged that said commissioner, Jas. W. Terrell, sell such lands at private sale, on terms one-fourth cash at time of sale and the balance in one and two years equal installments, with interest from date; and that he report semi-annually th eamount of such sales, *to whom sold*, at what date; *the particular tracts sold*, and the amounts received." (pages 70-71).

Terrell, commissioner, on the 27th day of December, 1884, executed a deed to Loomis and Wheeler (Record, page 97), under whom the defendant claims, purporting to convey to said Wheeler and Loomis certain trees then standing on a part of the land described in the complaint.

Also a deed dated December 27th, 1884, to the same grantees (Record, page 99), purporting to convey to them certain trees on other parts of the land described in the complaint.

that the rights of the defendants depended primarily on questions of law based on the documentary evidence of title, and that it would facilitate the hearing in the cause, to first determine such questions entered the order set out in the record, page 26.

Pursuant to this order the cause came on for hearing before his Honor, Judge Pritchard, on the questions presented by the pleadings and documentary evidence of title. (Record, page 30).

It was admitted that the plaintiff and the defendant both claimed title under W. H. Thomas, deceased, and that the plaintiff's exhibit "A, B and C" (pages 31 to 62) inclusive, of the record, included the land described in the complaint. Also that the deeds under which the defendant claims the trees, to-wit: Exhibits "E, F, G, H and I" (pages 97 to 112) inclusive, of the record, included a part of the lands described in the complaint.

The plaintiff offered in evidence the proceeding hereinbefore, mentioned, entitled in the matter of W. H. Thomas, Lunatic, instituted by W. H. Hilliard, guardian, in 1883, stating at the time, that it was offered solely for the purpose of attacking the same, on the ground that it was void for want of jurisdiction in the Court rendering the order of sale therein; and on the further ground that there was no description of any land therein sufficient to include any part of the land described in the complaint; or sufficient to authorize a sale by the commissioner therein appointed of any lands belonging to the lunatic, W. H. Thomas; and on further ground that in no event did the decree of sale entered in said proceeding authorize a sale of standing timber on the land belonging to the lunatic, separate from the fee in the land. The deeds hereinbefore mentioned under which the defendant claims and connecting its title with said above mentioned proceeding were also offered by the plaintiff for a like purpose.

The defendant admitted in its answer (Record, page 16), that it claimed certain trees standing on the lands described in the complaint by virtue of said proceeding and deeds and in its amended answer admitted (Record, page 28), that a part of the trees described in the

deed from Terrell, commissioner, to Loomis & Wheeler prior to their conveyance to the defendant W. C. Heyser, had been removed.

The defendant then offered, for the purpose of showing title in itself to the trees, the record of said proceeding entitled in the matter of W. H. Thomas, lunatic, including the proceedings purporting to be a part thereof had in the Superior Court for Jackson county after the resignation of Hilliard, guardian, down to and including the judgment confirming the report of referees entered by the Superior Court for Jackson county in 1905, this last report of said proceeding being set out in (Record, pages 79 to 97) inclusive.

Plaintiff objected to the whole of this record, for the purpose offered, on the ground that it was insufficient for the reasons hereinbefore mentioned to show any title to the trees in defendant; and further objected to that part thereof above referred to, on the ground that it was immaterial and irrelevant, and not a part of the proceeding in which it was attempted to authorize a sale of the lunatic's land, which objection was overruled and plaintiff excepted.

Upon argument and consideration of the questions presented on the facts as hereinbefore stated, the Court being of the opinion that the proceeding entitled, "In the Matter of W. H. Thomas, Lunatic," was sufficient in law to pass title to the trees in question and that the deeds executed by Terrell, commissioner, set out in record, passed to Loomis & Wheeler an indefeasible title in fee simple to all the trees described in said deeds, entered the decree set out in the record (page 117), decreeing that the defendant Brunswick-Balk-Collender Company under and by virtue of said deeds do take and hold an absolute and indefeasible title, in fee simple in and to all the trees mentioned and described in said deeds.

From which said decree plaintiff appealed, and assigned error as follows (page 123):

ASSIGNMENTS OF ERROR.

That the decree and judgment entered in this cause is

erroneous and against the just rights of the complainant, and that the decree of said Circuit Court of the United States is contrary to law and equity for the following reasons:

I.

Because the said United States Circuit Court erred in making and ordering the order in said cause dated the 9th day of November, 1906, in which it refused to remand the said cause to the Superior Court for the county of Swain in the State of North Carolina from which Court said cause had been removed at the instance of the defendant.

(1st Exception, page 15, Record, 1st Assignment of Error, page 122, Record).

II.

Because the said United States Circuit Court erred in sustaining over the objection and exception of the complainant, all of that portion of the transcript of record of the proceeding brought in the Probate Court of Jackson county, North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic," subsequent to the order made therein on the 1st day of April ,1905 (Record, page 79), which portion of said record so objected to was the whole thereof, excepting the first twenty-two (22) pages of Exhibit D, offered by the defendant in this cause.

(2d Assignment of Error, Record, page 123).

III.

Because the said United States Circuit Court erred in admitting in evidence on the trial of this cause, for the purpose of enabling the defendant to make out its defense, all and every part of the said record of the proceeding in the Probate Court of the county of Jackson and State of North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic, a copy of which proceeding is fully set forth in the record in this cause, page 62.

(Third Assignment of Error, page 123).

IV.

Because the said United States Circuit Court erred in

IV.

holding that the Probate Court of the county of Jackson in the State of North Carolina, in the proceeding therein pending, entitled, "In the Matter of William H. Thomas, Lunatic," had jurisdiction of the said proceeding and of the property referred to in said proceeding, and had any power or authority to entertain the same or to make any order to sell the property of said lunatic for the purposes set forth in said proceeding.

(4th Assignment of Error, Record, page 123).

V.

Because the said United States Circuit Court erred in holding that the property in controversy in this cause was described and embraced in the scope of said special proceeding brought in the Probate Court of Jackson county hereinabove referred to.

(5th Assignment of Error, Record, page 124).

VI.

Because the said United States Circuit Court erred in holding that said proceeding complied with the statutes of North Carolina in regard to the sale of the real estate of a lunatic and in holding that the order of the Probate Court in said proceeding particularly specified the property to be sold and the terms of sale of said property, and in holding that said alleged sale conveyed the interest of the said lunatic in the property in dispute in this cause, and in holding that the said sale was duly confirmed by the probate judge, as required by the statutes of North Carolina.

(6th Assignment of Error, Record, page 124).

VII.

Because the said United States Circuit Court erred in holding that the decree of sale made by the Probate Judge in said proceeding pending in the county of Jackson and State of North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic," authorized the commissioner appointed therein, James W. Terrell, to sell and convey the trees in controversy in this suit, and erred in holding that any sale made of said trees was valid and binding without the same having been duly reported to

IX.

the Court and the sale duly confirmed, as required by the statutes of North Carolina.

(7th Assignment of Error, Record, page 124).

VIII.

Because the said United States Circuit Court erred in holding that in said proceeding in the Probate Court of the county of Jackson and State of North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic," the whole or any part thereof was sufficient and adequate in law to authorize the commissioner appointed in said proceeding to make or execute any deed of conveyance or other paper-writing which would have the effect to convey the interest of said lunatic in the standing timber on his land, or any part thereof, or in the standing timber on the land described in the bill of complaint in this cause and in controversy in this suit.

(8th Assignment of Error, Record, page 124).

IX.

Because the United States Circuit Court erred in holding that the said proceeding in the Probate Court of Jackson county, North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic," authorized the said commissioner appointed therein to sell and convey the trees and property in controversy in this cause without making and filing a report in this cause, showing what particular trees were sold or what particular property or interest therein had been disposed of, describing the same specifically as required by the statutes of North Carolina, and without having the same duly confirmed by the Court.

(9th Assignment of Error, Record, page 124).

X.

Because the said United States Circuit Court erred in holding that the said proceeding brought in the Probate Court of Jackson county, North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic," constituted notice to the complainant in this cause and those under whom he claims title, or that said proceeding affected in

any way or manner the title to the property in controversy in this cause.

(10th Assignment of Error, Record, page 125).

XI.

Because the said United States Circuit Court erred in holding that the property in this cause was sufficiently described in the petition filed in said proceeding in the Probate Court of the county of Jackson and State of North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic."

(11th Assignment of Error, Record, page 125).

XII.

Because the said United States Circuit Court erred in holding that the property in controversy in this suit was sufficiently described or embraced in the Order of Sale (Record, page 79), purporting to have been made in said proceeding pending in the Probate Court of Jackson county, North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic."

(12th Assignment of Error, Record, page 125).

XIII.

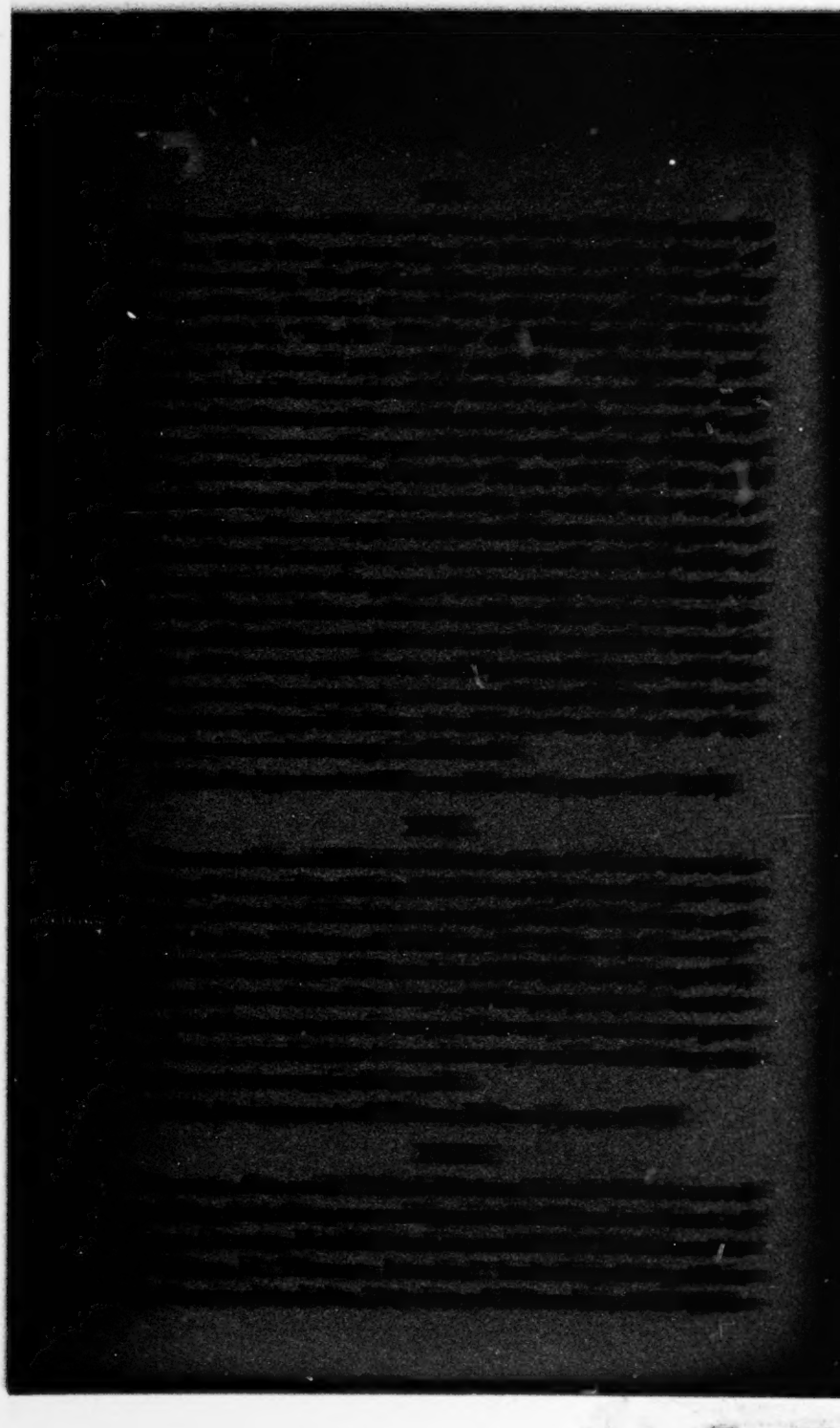
Because the said United States Circuit Court erred in holding that the report of the alleged sale of trees in said proceeding in the Probate Court of Jackson county, North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic" (Record, page 84), was sufficient in law and complied with the statutes of North Carolina.

(13th Assignment of Error, Record, page 125).

XIV.

Because the said United States Circuit Court erred in holding that the said alleged sale of said trees by the commissioner appointed in said proceeding pending in the Probate Court for the county of Jackson and State of North Carolina, entitled, "In the Matter of William H. Thomas, Lunatic," was duly confirmed by the Court, as required by the statutes of North Carolina.

(14th Assignment of Error, Record, page 125).



[redacted]

XVIII.

[redacted]

(17th Assignment of Error, Record, page 126).

XIX.

[redacted]

(18th Assignment of Error, Record, page 126).

XIX.

[redacted]

(19th Assignment of Error, page 127).

XX.

[redacted]

[redacted]

[redacted] by the complainant, one of which was executed by [redacted] and wife, and others, to J. S. Bailey, dated [redacted] day of April, 1906, and the other by J. S. Bailey [redacted] complainant herein, dated the 26th day of Septem[redacted], 1906, all of which were introduced by the complain[redacted] on the trial of this cause. (Record, pages 47 to 62).

(27th Assignment of Error, Record, page 129).

XXVIII.

Because the said United States Circuit Court erred [redacted] rendering judgment and entering a decree herein in the [redacted] that the defendant was the owner of all the trees [redacted] described and referred to in the several deeds of convey[redacted] under which defendant claimed the same.

(28th Assignment of Error, Record, page 129).

ARGUMENT.

I.

Petitioner's first assignment of error, page 123 of [redacted] record, based on the first exception, is to the ruling of [redacted] Court below in refusing to remand the case to the [redacted] Court for trial. (Record, pages 14 and 15).

The question presented by this exception and the [redacted] ment of error is as to whether defendants filed their [redacted] and bond in the State Court in apt time as re[redacted] by Section 3 of the Act of Congress March 3d, [redacted] Fed. Statutes Annotated, Volume 4, page 542, which [redacted] in part provides as follows: "That whenever any [redacted] entitled to remove any suit mentioned in the next [redacted] preceding section, except in such cases as are provided [redacted] the last clause of said section, may desire to remove [redacted] suit from a State Court to the Circuit Court of the [redacted] States, he may make and file a petition in such [redacted] to such State Court at the time, or at any time before [redacted] defendant is required by the laws of the State or the [redacted] of the State Court in which such suit is brought to [redacted] answer or plead to the declaration or complaint of the [redacted] plaintiff, for the removal of such suit," etc., and whether [redacted] not defendant by entering a voluntary general appear-

ance in the State Court did not waive its right to have the cause removed to the U. S. Court.

Under the laws of the State of North Carolina the defendants were required to answer or plead during the return term of the summons, to-wit: On or before the [illegible] day of August, 1906, the end of the term.

The statute of North Carolina, Section 473, Revisal 1905, provides as follows:

"The defendant shall appear and demur or answer at the same term to which the summons shall be returnable, otherwise the plaintiff may have judgment by default."

In case at bar the defendant did not move to remove the case to the Federal Court until October 26th, 1906, the time allowed by law for answer having expired, as above stated, August 8th, 1906. Revisal of N. C., 1905, Vol. 1, p. 1506. By consent of counsel, however, and for their convenience, plaintiff had been allowed sixty (60) days to file complaint and defendants thirty (30) days thereafter to answer.

The question therefore presented by this exception is as to whether or not the defendant's motion to remove was in apt time, it not having been made within the time allowed the defendant by the laws of North Carolina to answer or plead.

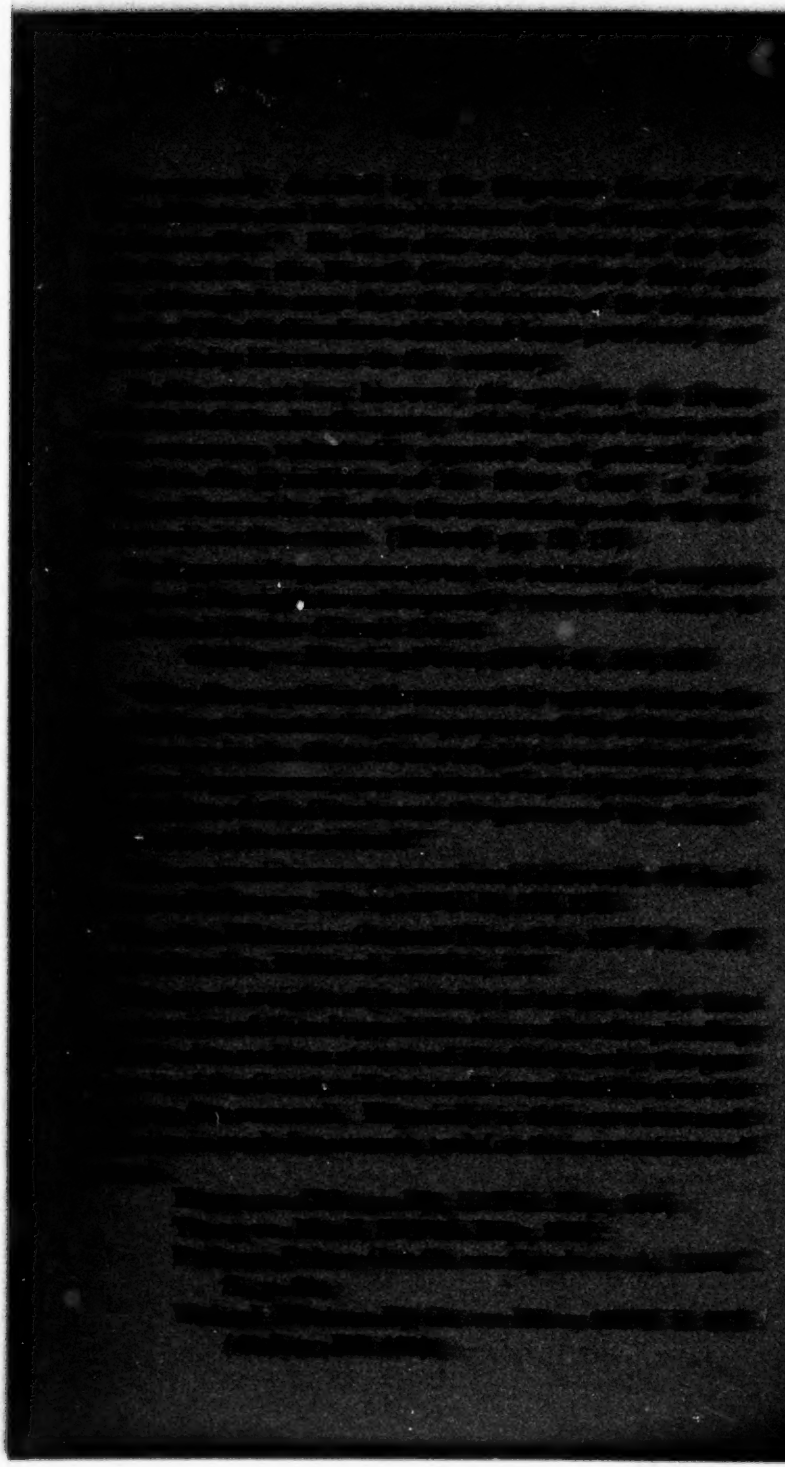
The exact question here presented has been expressly decided against the contention of the appellee in the case of:

Fox vs. Southern Railroad, 90 Fed. Reporter, 965;

Also by the State of North Carolina:

Bryson vs. the Railroad, 141 N. C., 594;
Howard vs. Railroad, 122 N. C., 945;
Hudson vs. Insurance Co., 153 N. C., 39;
Meeks vs. Mineral Co., 122 N. C., 790;
Bryson vs. Railroad, 141 N. C., 594.

In the case cited and relied on by opponents in this cause, Avent v. Lumber Company, 174 Fed., 293, Connor, District Judge, discussing the question, says: "It is conceded that the question raised upon the record has not



[redacted]

interest of the idiot or lunatic would be materially and essentially promoted by the sale of any part of such estate; or, whenever any part of his real estate is required for public purposes, the Court may order a sale thereof to be made by such person, in such way and on such terms as it shall adjudge: *Provided, however*, that the Court, if it be deemed proper, may direct to be made parties of such petition the next of kin or presumptive heirs of such lunatic person. And if on the hearing, the Court shall order such sale, the same shall be made and the proceeds applied and secured, shall deposed and be distributed, in like manner as is provided for the sale of infants' estate thereof in like cases to be sold on application for their guardians, as directed in the chapter entitled, 'Guardian and Ward.'"

From these it will be seen that the jurisdiction of the Probate Court over the property of a lunatic extended only by virtue of Section 6, to the sale or renting of his personal or real estate for the support of the lunatic, and the jurisdiction under Section 7, so far as affects this controversy, extended to the sale of his real or personal property only for his necessary maintenance, and for the discharge of debts unavoidably incurred for his maintenance. This is the plain meaning and statement of the statute. The Probate Court being one of special and limited jurisdiction, it had no power to exercise that conferred by statute.

Sutton v. Schoonmaker, 86 N. C., 199;
Cyc., Vol. 23, pp. 6 and 7;
Freeman on Void Judicial Sales, page 54, Sec. III;
Blake v. Rhyne, 77 N. C., 198, 199.

2. The petition before the Probate Court set forth several reasons for asking a sale of the property of the lunatic:

First. Insufficiency of income to pay taxes and expenses of litigation.

Second. Debts created prior to the inquisition of lunacy amounting to many thousands of dollars, and wh-

lingness of creditors to accept bond, or part payment in cash on settlement.

Third. Expenses in suits and litigation concerning the property.

Fourth. Debts created for the support and maintenance of the lunatic and education and support of the lunatic's infant children.

Record, pages 68-69.

On this petition the Court assumed jurisdiction, and proceeded to set, finding facts in regard to the lunatic's estate, his indebtedness, and amounts necessary for his maintenance. The debts were found to be more than $24,000, created prior to lunacy. Indebtedness created for the costs of litigation, fees, commissions, support of lunatic and his children, $2,450. Amount necessary to support the lunatic, $400 per annum. Amount necessary to support each of two minor children, $300 per annum. Amount necessary to carry on the litigation in behalf of the lunatic, $1,000 to $1,200 per annum.

Record, pages 69-70.

On these findings of fact the Court made a general order, Record, pp. 70-71, appointing a commissioner and directing him "to make a sale of the lands belonging to the lunatic, selling first such as may be discovered not to be included in the above named Johnston Judgment Lien and not involved in litigation and as may be most available, and from time to time such lands as are included in the Johnston Judgment Lien and which may be discharged therefrom, either by payment of the said judgment or by re-conveyance of the said Johnston until he shall realize the sum of $17,250. And to this end it is ordered and adjudged that the said commissioner, James W. Terrell, sell such lands at private sale on the terms, one-fourth cash at the time of sale, and the balance in one and two years equal installments, with interest from date, and that he report semi-annually the amount of such sales, to whom sold, at what date, the particular tracts sold, and the amount received."

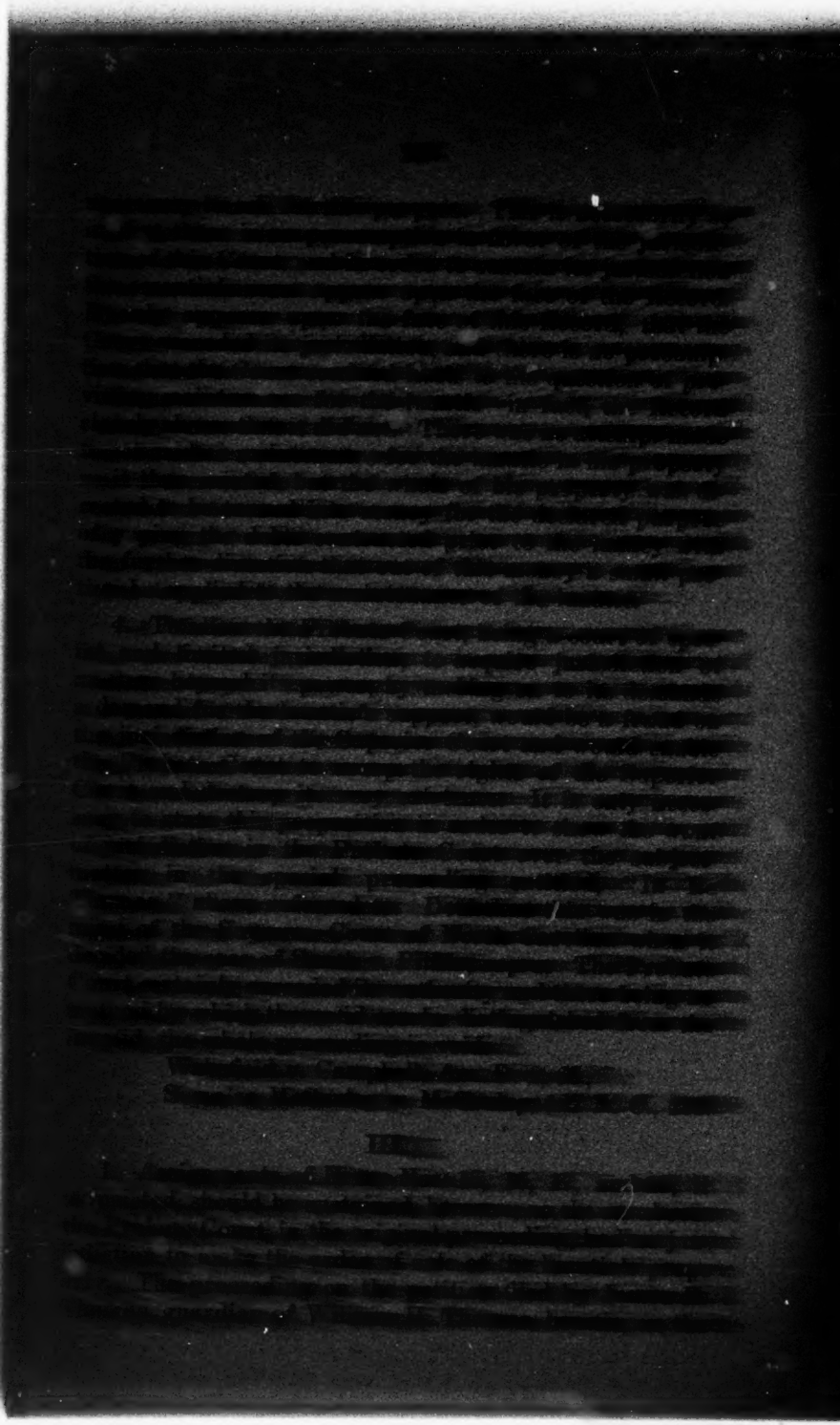
Clearly, under the sections of Battle's Revisal above quoted, the Court had no jurisdiction to order the sale of

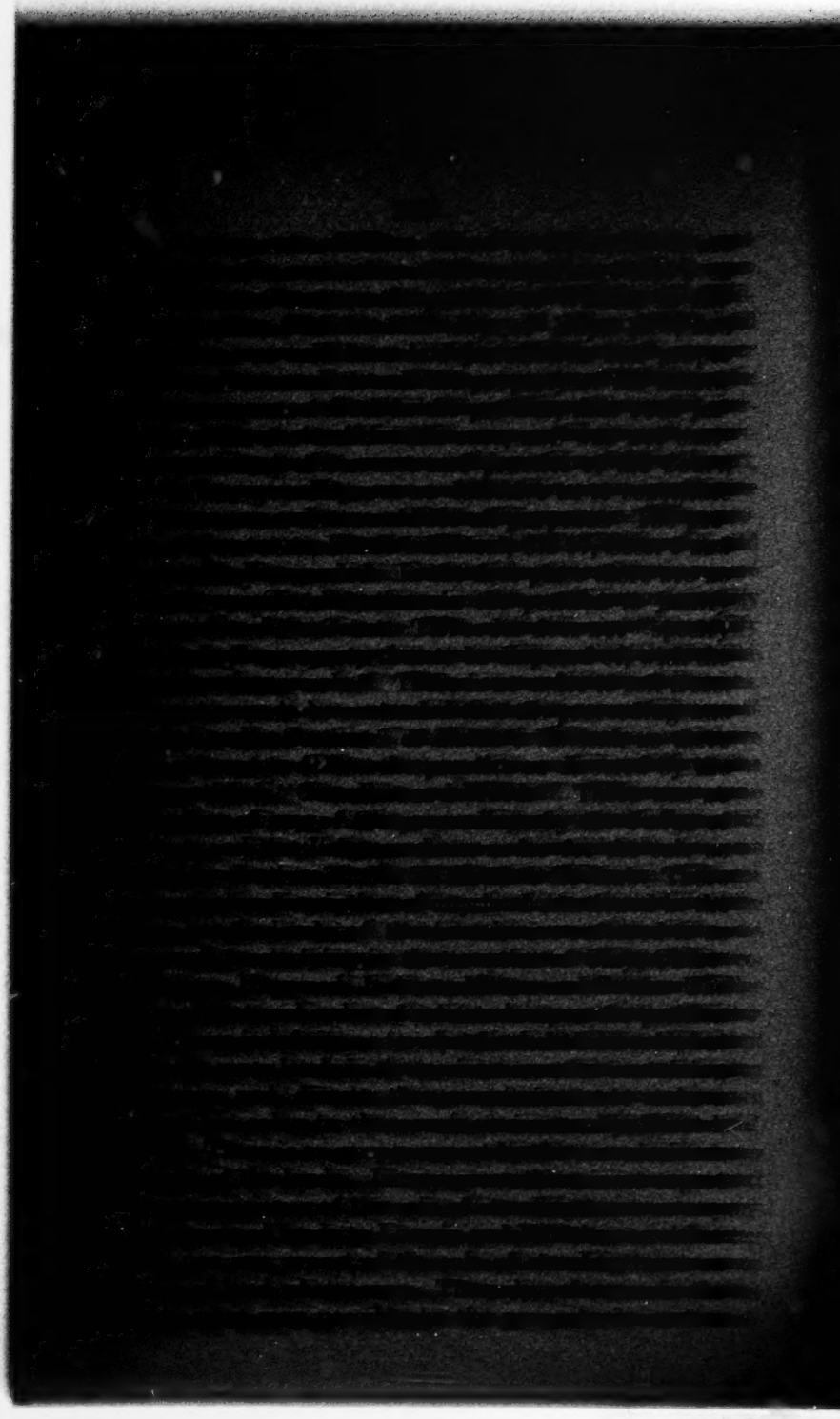
the land of the lunatic to sale for the payment of his debts contracted prior to lunacy, for the payment of costs and expenses of litigation and for other purposes not covered by the statute. The Court finds as a fact that it will cost $400 a year to support the lunatic, $600 a year to support the minor children, $1,200 a year to prosecute law suits and pay other expenses and directs the payment of $8,450, previously incurred, for fees, commissions, expenses, for the support of the lunatic and his infant children and the setting aside of $6,000 for the future support of the lunatic, and then directs a sale of all the lands of the intestate, amounting to 40,000 acres. The Superior Court in Equity was the only Court of North Carolina which had jurisdiction to make such an order as that set out in this proceeding, and the Supreme Court of North Carolina has expressly so declared as to this proceeding and as to debts mentioned in this very petition.

Adams vs. Thomas, 86 N. C., 521;
Adams v. Thomas, 91 N. C., 296.

3. It appears also from the report of the commissioner, Record, pp. 75-76, that none of the funds derived from the sale of lands, which amounted to $9,529.59, were paid to the guardian of the lunatic except the paltry sums of $100 on November 3, 1885, Record, p. 77, and $100 May 25, 1886, Record, p. 77. The fact that provision is made in the proceeding for the maintenance of the lunatic could not have given the Court jurisdiction to make such an order. No one can tell from this order whether the lands sold were actually sold to support the lunatic or for the other purposes, but it appears from the report of the commissioner above referred to, *that the funds were used for other purposes and approved by the Court April 1, 1885, Record, p. 79*, long after the sales which must therefore have been made for the purposes for which the funds were used.

The Probate Court had jurisdiction only to sell so much of the land of the lunatic as was necessary for his maintenance, and to pay debts necessarily contracted for that purpose, and in order to sustain the jurisdiction of the Court even in this respect, it would be necessary for the Court to find first how much of the land itself it was





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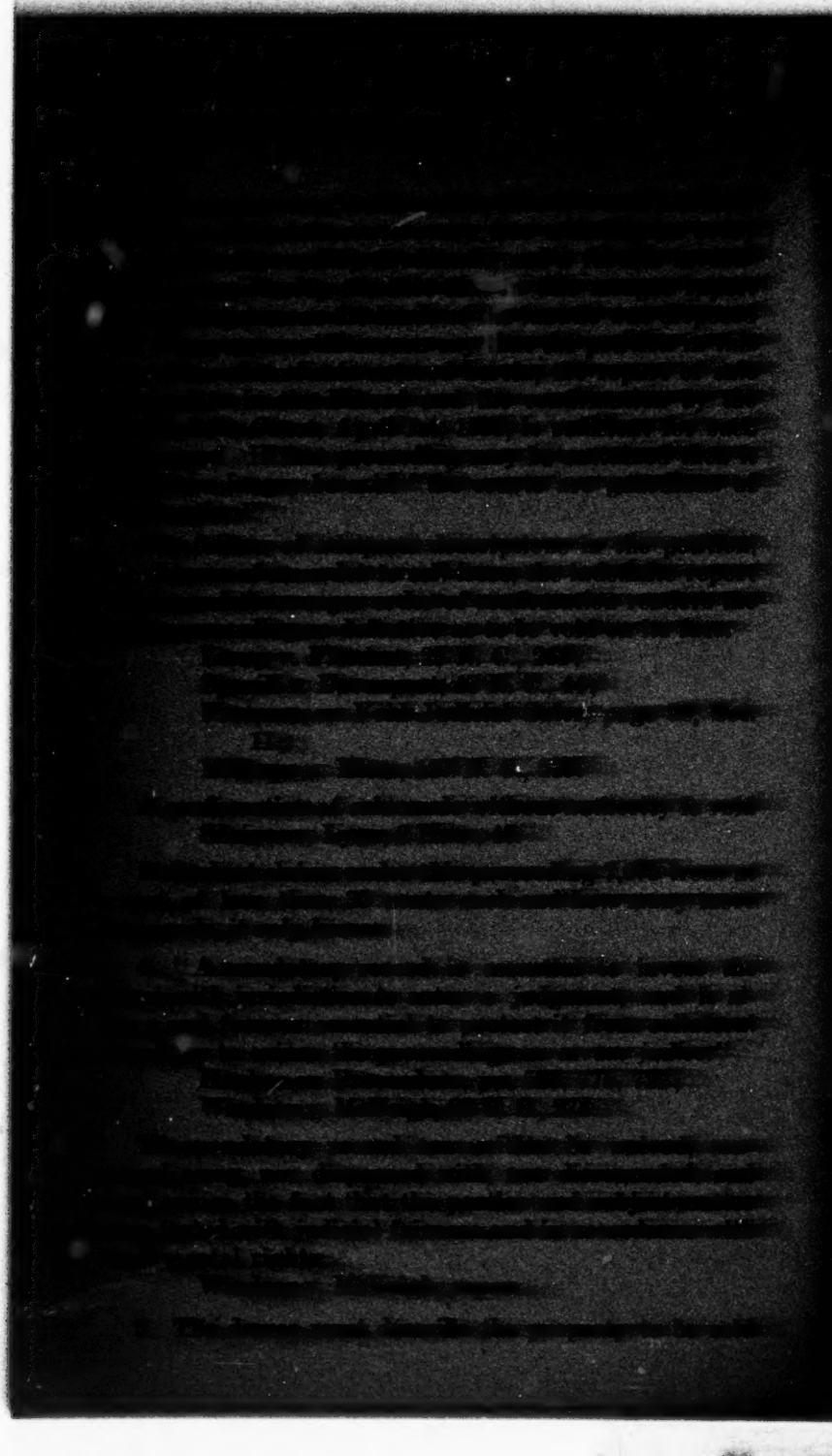

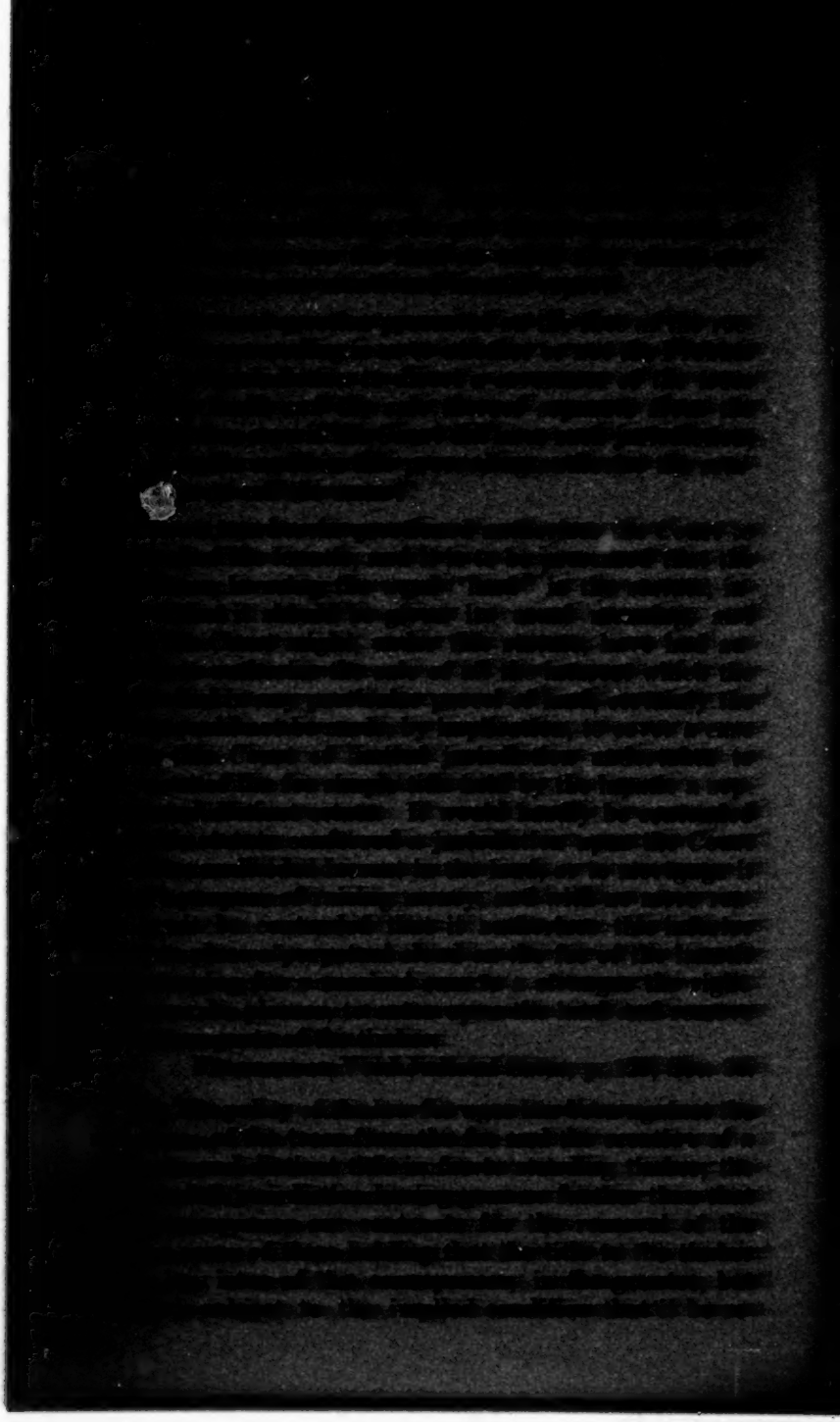

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Battle's Revisal, Chap. 55, Sec. 35.

Even this section does not authorize the conveyance of the fee in the trees, but clearly contemplates only the sale and removal of the timber. The same reasoning would apply in construing the order of the Court, as is applied to the construction of the statute, and certainly the commissioner could not exceed the authority given him in the order.

For the foregoing reason, the plaintiff contends that the Probate Court had no jurisdiction to authorize the sales in question. The defendant, however, implicitly admits this and relies upon the fact that the confirmation of the sale by the clerk cures such defect, and further that the proceeding was afterwards transferred to the Superior Court and there confirmed by the judge. As to this the plaintiff contends, first, that the sale in question was never reported, and therefore never confirmed, but admitting for the sake of the argument, and for that alone, that it was, the confirmation would merely cure the irregularities, and it would seem unnecessary to cite to this Court authority for the proposition that the confirmation of a void sale will never in any case render such sale valid, and there can be no doubt, in case the Probate Court had no jurisdiction, that all of its orders and pro-

V

...ommended on the part of purchasers from Terrell, ...ssor, and those claiming under them that they ...chasers of the property without notice. The ...ities, irregularities and failure of jurisdiction ...ed for the reasons hereinbefore set forth would ...ffect them, because they were fixed with notice of all ...appearing in the record under which they claim ...observe a record is so defective and is so clearly ...as in this case a purchaser cannot complain ...ose the purchase money. A good illustration ...doctrine is found in the case of Millsaps v. Estes, ...C., 538; 544-545.

VI.

...plaintiff's 28th assignment of error should ...tically be sustained. The defendant in its answer, ..., page 26, and on the admitted facts in this case,

[redacted] the trees described and referred to in the deeds under which the defendant claims the same, whereas it is admitted that the defendant was still owner of a portion of said land and had the right to enter the same and cut therefrom the same number of trees which were described in the said deeds under which the defendant claims the same.

For the causes herein set out the appellant prays that this Honorable Court to reverse the decree appealed from.

JULIUS C. MARTIN,
Counsel for Petitioner.

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CASES.

Brief for the Respondent.

(22,447)

Supreme Court of the United States.

FOURTH CIRCUIT.

No. 188.

C. H. REXFORD, PETITIONER,

VS.

THE BRUNSWICK-BALKE-COLLENDER COMPANY.

Brief for the Respondent.

FIRST POINT.

No brief having been filed in this cause on behalf of the petitioner affording information of what petitioner will contend, or rely upon, in argument, we will take for guide the ruling of this Court in Hubbard v. Tod, 171 U. S., 474, to the effect that, "on the hearing of a case, brought by certiorari from a Circuit Court of Appeals on petition of one of the parties, in which the judgment of that Court is made otherwise final, this Court will pass only upon the errors assigned by the petitioner," and undertake to show that none of the assignments of error is tenable.

"The petitioner here insists that the said judgment of the said Circuit Court of Appeals was erroneous and contrary to law" in five particulars, and we will reverse the order in which he has placed them, and discuss, first, his

FIFTH ASSIGNMENT OF ERROR:

"That his Honor, Judge Jas. E. Boyd was not competent to sit upon the hearing of said cause in the Circuit Court of Appeals because the statute of the United States, Act of Congress March 3, 1891, Ch. 517, Sec. 3, provides as follows: Provided that no Justice or Judge before whom a cause or question may have been tried or heard in the District Court or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals."

Petition, page 15.

On the third page of his petition the petitioner alleges that he "is advised and believes, one of the Judges who, *by inadvertence and by consent of counsel for the petitioner*, sat on the trial of said cause in the United States Circuit Court of Appeals, was incompetent to sit thereon because he had heard a question in said cause in the Cir-

cuit Court and had decided the same," had denied a motion to remand to the State Court. Substantially the same statement appears in the petition at foot of p. 16, *et seq.*, but the real facts appear on page 151 of the "Transcript of Record," and do not depend upon information and belief. They are here as part of the record with the consent of petitioner's attorney.

Sufficient appears to show that Judge Boyd, although occupying his seat on the bench as usual, took no part in what occurred to remove his disqualification to sit as one of the Court on the hearing of the cause. There was no "inadvertence," but the matter was well understood, and what was done, to qualify Judge Boyd to sit on the hearing, was done by the petitioner's counsel.

The exception to the refusal of Judge Boyd to remand was, in effect, withdrawn, and counsel admitted that the removal from the State Court to the Federal Court was right.

Without any participation by Judge Boyd, the quorum of the members of the Court was competent to allow the withdrawal of the exception and a waiver by petitioner of all objection to the removal of the cause to the Federal Court.

By reference to the order denying the motion to remand, (Transcript of Record, p. 15), this Court will see that the only ground for remand insisted upon, on behalf of the petitioner, before Judge Boyd, was, "whether the defendants filed their petition and bond for removal in the State Court, in apt time, as required by the statutes in such cases made and provided, and thereupon contended that such petition and bond were not filed in apt time, and that the cause should for this reason be remanded."

We insist that this was a matter that might be and was waived, and was no longer "a question" in the cause, whether the waiver had the effect to remove the alleged disqualification of Judge Boyd or not. The two judges, not disqualified, being a quorum, were competent, as a court, to allow the waiver to be made a matter of record.

Cincinnati etc., R. Co. v. McKeen, 149 U. S., 259, 260.

"The time of filing a petition for removal is not essential to the jurisdiction. The provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel."

Powers v. Railway, 169 U. S., near middle of p. 98.

The petitioner not only waived, and is estopped as to, this matter of time, by what occurred as set forth above, but by what he did in the Circuit Court after the removal. After the removal he did not stand upon the complaint he filed in the State Court, but asked for and obtained from the Circuit Court, into which the case had been removed from the State Court, leave to file an amended complaint and did file a new pleading covering much ground not covered by the original complaint, and, in effect, introducing a new cause of action, and praying for a perpetual injunction, etc. Transcript of Record, 3, 20, 22, 23.

In re Moore, 209 U. S., 490, 496.

We have discussed, in the first place, the alleged disqualification of Judge Boyd because we understand, from the decision of this Court in the case of Moran v. Dillingham, 174 U. S., 153, 158, that if this Court shall be of opinion and decide that Judge Boyd "was incompetent to sit on the appeal in question, and the decree, in which he participated, was not made by a court constituted as required by law," it will, "without considering whether that decree was or was not erroneous in other respects," order the

"Decree of the Circuit Court of Appeals to be set aside and quashed, and the case remanded to that Court to be there heard and determined according to law by a bench of competent Judges."

We will add to what we have already said, that we think the case, last cited, is an authority, or, at least, the opinion contains suggestions which lead us to believe that, after the petitioner withdrew his exception to the refusal of Judge Boyd to remand, there remained no longer any reason why that Judge was not competent to sit as a member of the Court of Appeals. Judge Boyd had never heard anything "upon the law or upon the facts, in the

Court of first instance," of the case the Court of Appeals was invited, by the petitioners, to hear and determine. The petitioner, through his counsel, had put out of the case, as we think he had the right to do, all objection to the rightfulness or wrongfulness of the procedure by which the cause was brought into the Circuit Court of the United States, and the Court of Appeals had nothing before it but "a whole cause" in the precise plight it would have been in, if the suit or action had been originally commenced in the Circuit Court of the United States.

We think that the question we have discussed was the one on which the writ of certiorari was granted—that without it the case is not

"One of gravity, where there is a conflict between decisions of the State and Federal Courts, or between those of Federal Courts of different circuits, or something affecting the relations of this nation to foreign nations, or of general interest to the public."

Fields v. United States, 205 U. S., 292.

We are very sure, too, that there is, in the case, no "conflict of decision between the decision of said Circuit Court of Appeals and this honorable Court on a vital and controlling matter in the said cause," and that there is no "conflict of decision between the said Circuit Court of Appeals and the Supreme Court of North Carolina," as alleged in the petition on page 3 thereof. If we are correct in these views we respectfully insist that the petitioner should be required to pay the costs of these proceedings.

It is now clear that the petition, as originally filed in this Court, did not show to the Court that the petitioner's counsel, by the course they pursued in the Circuit Court of Appeals, when the cause was called for hearing in that Court, not inadvertently, but intentionally waived all objection to that Court, by withdrawing the exception and assignment of error, we have been discussing, and stating to that Court "that there was no objection to Judge Boyd sitting:" It was *"thereupon the argument proceeded and the case heard."* Transcript of Record, 151.

We submit, at this point, that the facts we have just

stated, from the "Transcript of Record," furnish good cause for the dismissal of the petition for, and writ of, certiorari. Petitioner ought not to be allowed to profit by what he himself intentionally and deliberately caused.

SECOND POINT.

Before considering the other errors assigned we ask the Court's attention to the question of the

JURISDICTION

of the Circuit Court of Appeals to entertain the appeal in this cause, and here quote from the brief we filed in that Court, as follows:

As this Court is bound to inquire as to its own jurisdiction even when the question is not raised by the parties to the action, Puget Sound Nav. Co. v. Lavender, 84 C. C. A., foot of p. 259, 156 Fed. 361, citing M. C. & L. Ry. Co. v. Swan, 111 U. S., 379; and as this Court is without jurisdiction, unless the decree appealed from is a final decree, and will, *sua sponte*, dismiss the appeal, Robinson v. City of Wilmington, 9 C. C. A., foot of p. 85, 60 Fed., 469, 4th circuit; King Bridge Co. v. Otoe Co., 120 U. S. 225, we feel it our duty to call the attention of the Court to this question *in limine* to the end that if the Court should be of opinion that the decree appealed from is not final, the appeal may be dismissed at once. * * *

As to what constitutes a final decree from which an appeal lies we cite: Cassatt v. Mitchell Coal & Coke Co., 81 C. C. A. 84, 85, 150 Fed., 32, 36, 37, and cases there cited. The rule, as stated by Chief Justice Waite in Grant v. Phoenix Ins. Co., 106 U. S., 429, is: "The rule is well settled that a decree to be final within the meaning of that term as used in the acts of Congress giving the Court jurisdiction on appeal must terminate the litigation of the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the decree it had already rendered." See also Norris Safe & Lock Co. v. Manganese Steel Safe Co., 80 C. C. A., 563, 150 Fed., 577; Mercantile

Trust Co. v. Chicago, P. & H. L. Ry. Co., 60 C. C. A. 651, 123 Fed., 389.

The decree is doubtless final as far as it goes, but it concludes with: "And this cause is retained for further orders." Record, 140, 141; and shortly after it was entered of record the plaintiff moved the Court "that this cause be referred to a master to hear the testimony and take proofs *of all matters at issue* in this cause, not heretofore heard by the Court." Record, 143, and this motion was granted by the Circuit Judge as follows:

"This cause coming on to be heard upon the application of complainant for reference thereof, and it appearing to the Court that the pleadings in the cause are filed and the documentary evidence pertaining to the title to the trees described in the pleadings filed in this cause has been heard by the Court;

"*And it further appearing to the Court there is much other proofs touching the matters in issue necessary to be heard, looking to* A FINAL JUDGMENT, and it further appearing that a reference should be had;

"It is now here ordered that the said cause be, and the same is hereby, referred to A. A. Featherston, Junior, Esq., as Special Master of this Court, and he is hereby made a Master in said cause and directed to take proofs *of all and singular* the *issues herein* (except the evidence in the cause heretofore heard by this Court), especially to take evidence concerning the identity of certain marked trees described in the pleadings, *and to report the number and identity of such trees*, and to ascertain and report his findings to this Court, and that he be and is authorized to discharge his duties as such Master at any convenient place as he may be advised." Record, 143-144. * * *

> The Record referred to in the foregoing quotation is the printed Record in the Circuit Court of Appeals, the pages in which appear on the margins of the pages of the printed record in this Court. Hereafter in this brief the references will be to the pages of the printed record *in this Court*.

True, it was decided in Harriman v. Northern Secur-

ities Co., 197 U. S. 244, and before that case, that "the lack of finality in a decree reversing an order of a Circuit Court granting a preliminary injunction will not prevent a review in the Supreme Court by writ of certiorari issued to a Circuit Court of Appeals, where the record presented the whole case to that Court so that it might properly have been finally disposed of in terms by its decree."

But in that case the appeal was from an appealable order. In the case at bar the decree or order of the Circuit Court, unless a final decree, was not one from which an appeal could be taken.

THIRD POINT.

We would close this argument here, but we are aware that this Court has very recently decided that

"On certiorari granted under the provisions of the Court of Appeals Act of 1891 the entire record is here before the Court with power to decide the case presented to the Circuit Court of Appeals on the writ of error based on it."

Lutcher & Moore Lumber Co. v. Knight, 217 U. S., 257.

The same rule, we take it, applies where the case was brought to the Circuit Court of Appeals, not by writ of error, but by appeal.

Loeme v. Lawlor, 208 U. S., 274.

Therefore the other "particulars" in which the judgment of the Circuit Court of Appeals "was erroneous and contrary to law," as "the petitioner insists," it should seem are to be discussed.

We have, as we think, already shown that there was no basis for the petitioner's first assigsment of error, viz.:

"That the judgment of the said Circuit Court of Appeals was erroneous and contrary to law,"

"First.—That said Circuit Court erred in refusing to remand the said cause to the State Court for trial," on the ground that the "Brunswick-Balke-Collender Company had entered a general appearance without service

of process on it, by consent of counsel plaintiff was allowed sixty days to file his complaint and the defendant thirty days after notice thereof to answer. The question here presented is whether or not the defendant's petition to remove was filed in that time."

The respondent denies the facts, alleged in this assignment of error, and avers that they are not shown by the transcript of the record or in any other manner which this Court will consider.

The transcript of record does not show that the respondent was ever served with a summons, (Transcript of Record, 2, 3), and it is admitted by the petitioner it was not. There is nothing in the record to show that any general or special appearance was made or entered by or on behalf of the respondent in the State Court prior to filing the petition for removal. On the return of the summons, which was served on respondent's co-defendant, W. C. Heyser, the entry made on the docket of the State Court was:

"Page 151, July Term, 1908.

"Plaintiff allowed 60 days in which to file complaint," and later, but not in term, so far as the record shows, this:

"Page 182.

"Defendant allowed 30 days after notice answer. Complaint filed Sept. 30, 1908." Record, p. 12.

There is nothing here to show an appearance even for the defendant Heyser who was served, but it is reasonable to infer that he was "allowed 30 days after notice to answer;" but, surely, it cannot be claimed that this entry amounts to a general appearance for both defendants. This entry was not made at the "July Term" and if "July Term" were the term at which an answer was due according to Bryson v. Railroad, 141 N. C., 594 and Ford v. Lumber Co., 155 N. C., 352, of course the respondent, not having been served with a summons, was not in Court. There was no other term of the Court between the "July Term" and the term of the Court at which respondent filed his petition and bond for removal. Pell's Revisal (N. C.), page 815. There was no term of Swain County Superior Court called September-October Term. If re-

spondent had entered a general appearance at the next term of the Court, after the July or return term, it would have been entitled to the entire term to file its answer.

The fact is, certainly the record shows nothing to the contrary, that the only appearance ever entered by the respondent, in the State Court, was by the filing of its petition and bond for the removal of the cause, and, nothing else appearing, that appearance must be regarded as a special appearance.

Wabash etc. Ry. Co. v. Brow, 164 U. S., 271;
Spiro v. National Acc. Society, 164 U. S., 278.

There is a multitude of decisions of this Court and of the Circuit Courts of Appeals which recognize the right of a defendant, who was named in the summons, to go into the State Court and apply for removal of the cause to the Federal Court, and, after getting the cause into the Federal Court, to show he was never served with the summons in the State Court, and the State Court therefore never acquired jurisdiction of his person. In the case at bar the respondent applied to the State Court in due form for the removal of the cause after a summons had been issued against it and claim made that it had been brought or appeared in Court. The respondent knew an action had been begun against it, and that it had the right to have that action tried in a Federal Court, and it never did anything to waive that right.

But if that appearance had been entered in such manner as to justify the State Court in holding that it was a general appearance, this would not have deprived the respondent of its right to have the cause removed to the Federal Court. Bridge Co. v. Bridge Co., 137 Fed., 284. The motion to remand (Record, 14-15), as heard before Judge Boyd, was not based upon a want of jurisdiction of the Federal Court, but petitioner restricted the grounds of his motion to the question "whether the defendants filed their petition and bond for removal in the State Court in apt time, as required by the statutes in such cases made and provided." Record, 15.

No point was made, on the hearing of the motion to remand, before Judge Boyd, that this respondent was barred of his right to removal because of the character

of the appearance it entered in the State Court. The point made was that the time for answering had expired. In its petition the petitioner (p. 14) says, "plaintiff was allowed sixty days to file complaint and defendant thirty days after notice to answer—the question here presented is whether or not the defendant's petition to remove was filed in that time." Judge Boyd found that the petition was filed in apt time.

The Judge of the State Court approved the bond for removal, but, instead of ordering the removal, assumed jurisdiction to pass upon the allegations of the answer to the petition for removal, and refused to make an order of removal.

We think he had no jurisdiction. As said in Shaw v. Butte Electric Ry. Co., 150 Fed., 801, 805: "It presents then to the State Court a pure question of law, and that is, whether admitting the facts stated in the petition for removal to be true, it appears upon the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit."

In Kansas City Railroad v. Daughtry, 138 U. S., foot of p. 302, it was said:

"The Supreme Court of Tennessee was of opinion that it was competent for the State Court to pass upon the issue of fact made by the affidavit of Daughtry upon the statement in the petition in regard to citizenship, and to retain the suit, because on that issue the railroad company had not shown that he was a citizen of Tennessee, but it is thoroughly settled that issues of fact raised upon a petition for removal must be tried in the Circuit Court of the United States."

Upon the filing of the petition with a sufficient bond the case was removed and the State Court had no jurisdiction to enter upon a trial of any issues whatever.

Traction Co. v. Mining Co., 196 U. S., 239.

Judge Boyd could not have done otherwise than he did in denying the motion to remand.

In Atlanta, K. & N. Ry. Co. v. Southern Ry. Co., 66 C. C. A., top of p. 605, 131 Fed., 857, Lurton, Circuit Judge,

said: "A defendant should not be deprived of his constitutional and statutory right to a trial in a court of the United States upon the ground of waiver unless a clear case of intent to submit and have a hearing in the State Court is made to appear. The mere filing of an answer or plea or any other defense before it is due under the law or rule of the State Court is not inconsistent with the subsequent removal of the case. The premature filing of a defense is in no sense a trial or hearing, and is not conduct establishing a waiver of the right to remove. The statute does not require the petition to be filed before any defense is filed, but only before the time when the first defense is required to be filed." This certainly covers the case where there had been what might be termed a general appearance. In the case at bar no defense was filed in the State Court at any time. None was required to be filed until 30 days after notice of the filing of the complaint even as to the defendant Heyser. The defendant could not know until after the filing of the complaint whether the case would be a removable one or not. Remington v. Central Pac. R. R. Co., 198 U. S., 95.

So long as the record does not disclose, on its face, the facts which would entitle the defendant to remove the case, he is not precluded from making such application after the fact is disclosed. Robinson v. Parker-Washington Co., 170 Fed., 851. We have a case where the requisite diversity of citizenship was present, and the action a local one.

In Kreigh v. Westinghouse etc., Co., 214 U. S., foot of p. 252, it was said: "But it appears that no motion was made for want of jurisdiction in the Federal Court, and no question was made as to the jurisdiction until the case came here. In that state of the record the defect as to jurisdiction being simply as to the district to which the suit was removed, the parties being citizens of different States, the objection to the jurisdiction might be, and, in our opinion, was waived, by making up issues on the merits without objection as to the jurisdiction of the Court," citing In re. Moore, 209 U. S., 490, and Western Loan & C. Co. v. Butte Mining Co., 210 U. S., 368.

The action, being a local action, the plaintiff might

have commenced it originally in the Circuit Court of the United States under Sec. 738 of the Revised Statutes as amended by the Act of March 3, 1875. Under that section the location of the land fixes the venue. Greely v. Lowe, 155 U. S., 58; Dick v. Foraker, 155 U. S., 404; Citizens Savings and T. Co. v. Illinois Cent. R. Co., 205 U. S., 46.

"The right to remove * * * depends upon whether the suit could originally have been brought in the Circuit Court of the United States." Matter of Dunn, 212 U. S. 384 and cases there cited; Gillespie v. Pocahontas Coal & Coke Co., 162 Fed., 742; Blackburn v. Blackburn, 142 Fed. 901, 902.

In concluding this assignment of error, we take it for granted that the burden is on the petitioner to show, first, that Judge Boyd erred in denying the motion to remand, and that the "judgment of the Circuit Court of Appeals was erroneous and contrary to law," because it did not reverse Judge Boyd's ruling and remand the cause to the State Court. The answer to the petition for removal filed by the agent and attorney of Rexford in the State Court was no evidence of the facts stated in it. It was not signed or verified by the plaintiff in the case, and the person who signed and verified it did not claim that he had any personal knowledge of what he alleged, but, in his attempted verification, said: "and the facts stated in the foregoing answer are practically all of record and are within the knowledge of this affiant." The record, as has already been shown, does not disclose the facts alleged in the answer.

The affidavit of Fry is contradicted by the record which distinctly shows that the summons was served only on W. C. Heyser by reading it to him. Transcript of Record, top of p. 3. It could have been served on the respondent, a corporation, by a copy and not by reading it.

Pell's Revisal of 1908 (N. C.), Sec. 440.

The original summons was issued on the 9th of June, 1908, and was made returnable the 27th of July, "at a court to be held for the County of Swain at the court house in Bryson City." Record, 2. Some time before the return day of the summons a Judge, at his chambers, in another county, it is claimed by petitioner, in his an-

swer to respondent's petition for removal, heard a motion for a restraining order, on which hearing the motion was resisted by defendants in the case. There is no evidence of this, but if it were true it did not deprive the respondent of its right to the removal. Atlanta etc. Ry. Co. v. Southern Ry. Co., 66 C. C. A., 601, 605-607, 131 Fed., 657. The petitioner in his said answer, (Record, 10), further says, on information and belief, that the return term of the summons was "the September-October Term of Swain Superior Court, 1908." This is shown not to be true by the summons itself. Record, 2. As stated before, there was no "September-October Term, but only an October Term. But every presumption will be indulged in support of Judge Boyd's denial of the motion to remand, in the absence of anything in the record to show that the motion should have been granted.

The right to remove can neither be abridged by State statutes nor by findings and rulings of Judges of State Courts after petition and bond for removal have been duly filed in the State Court.

Courtney v. Pradt, 196 U. S., 89, 93.

FOURTH POINT.

SECOND ERROR ASSIGNED,

Is that the probate Court had no jurisdiction to make the order of sale of the property of the lunatic for the payment of his debts. Petition, 15. The purpose of this assignment of error is to obtain the judgment of this Court as to the validity of the special proceeding begun in a probate Court in North Carolina. The record in that proceeding will be found in full in the Record in this case and is "Plaintiffs' Exhibit D," pages 63 to top of page 113.

William H. Thomas, for some years prior to 1880, had been lunatic, and his creditors, who had judgments against him, were endeavoring to enforce their collection. One Adams, a judgment creditor, had made a motion for leave to issue execution, on which the Supreme Court ruled that the "property of a lunatic in the hands

of a committee is regarded as *in custodia legis*, and no creditor can reach it for a debt pre-existing the inquisition of lunacy, except through the order of the Superior Court; and that order is never made until a sufficiency for support of the lunatic and that of his family, if minors, is first ascertained and set apart." The Court said further: "In such a state of the case, all that we can do is to continue the motion with leave to renew it again hereafter when a maintenance for the lunatic has been assigned; and in the meantime to direct the guardian to proceed before the Probate Court of Jackson county to have a sufficiency of the lunatic's estate set apart for his support and that of his family who are minors, and to report to this Court, when assigned, an inventory or schedule thereof," etc.

Adams v. Thomas, 81 N. C., 296, 298.

It was in pursuance of the direction of the Supreme Court that the special proceeding, in question, was begun in the Probate Court of Jackson county, and a report was made to the Supreme Court of what had been done in regard of which that Court said: "Of the legality of the proceedings in the Probate Court and of the mode of setting apart a maintenance for the lunatic, and the property wherein it is done, and the amount set apart and the allowance for past and future litigation, we are not a liberty to speak, because no case involving exceptions therefor is before us by appeal; *but all we can say is, that subject to a reasonable maintenance of the lunatic and his minor children, the residue of his property is liable to pay his debts anterior to the lunacy and ought to be applied.*"

Adams vs. Thomas, 83 N. C., 521, 523.

These decisions were before the trial Judge on the hearing.

If there had been anything wrong with the proceeding in the Probate Court of Jackson county, the Supreme Court would have said so—certainly if there had been any lack of jurisdiction.

The proceeding was in strict accordance with the law in force at the time, viz.: "Whenever it shall appear to

any Judge of Probate, by report of the guardian of any idiot or lunatic, that his personal estate has been exhausted, or is insufficient for his support, and that he is likely to become chargeable on the parish, the Judge of the Probate Court may make an order for the sale or renting of his personal *or real estate, or any part thereof, in such manner and upon such terms* as he may deem advisable. Such order shall specify particularly the property thus to be disposed of, with the terms of renting or sale, and shall be entered at length on the records of the Court; and all sales and rentings made under the provisions of this section, shall be valid to convey the interest and estate directed to be sold, and the title thereof shall be conveyed by such persons as the Court may appoint on confirming the sale; or the Court may direct the guardian to file his petition for such purpose."

Battle's Revisal, Chap. 57, Section 6;
The Code of N. C. (1883), Vol. 1, Sec. 1674.

The course and practice in directing judicial sales should be that of courts of equity. Hyman v. Jarnigan, 65 N. C., 98. Superior Courts have succeeded to and possess the jurisdiction and power of the late courts of equity.

Tate v. Mott, 96 N. C., 22;
Hudson v. Coble, 97 N. C., 260;
Settle v. Settle, 141 N. C., 553, foot of p. 562;
Springs v. Scott, 132 N. C., 561.

While the statute authorizes a sale *"in such manner and on such terms as he may deem advisable,"* and this would be sufficient to authorize the commissioner appointed for that purpose to make and report a private sale, yet a private sale would have been valid without the statute.

Rowland v. Thompson, 73 N. C., 504;
Morris v. Gentry, 89 N. C., 251;
Sutton v. Schonwald, 86 N. C., 202;
Barcello v. Hapgood, 118 N. C., 725;
McAfee v. Green, 143 N. C., 415;
Vorhees v. Bank, 10 Pet., 450; 1 Wall., 627.

By Chap. 90, Section 1 of Battle's Revisal, the clerks

of the Superior Courts of the several counties of the State were made Judges of Probate, but this office was abolished by Section 102 of the Code of N. C. (1883), which is as follows: "The office or place of Probate Judge is abolished, and the duties heretofore pertaining to Clerks of the Superior Courts as Judges of Probate shall be performed by the Clerks of the Superior Court as Clerks of said Court, and all matters pending before said Judges of Probate shall be deemed transferred to the Clerks of the Superior Court."

This section of the Code was construed by the Supreme Court in Edwards v. Cobb, 95 N. C., 4; Helms v. Austin, 116 N. C., 753; Brittain v. Mull, 91 N. C., 498.

1 Pell's Revisal, Sec. 614 and cases there cited.

But by Chap. 276 of the Public Laws of N. C., 1887, (now Sec. 614 of the Revisal of N. C., 1905), it was provided: "Whenever any civil action or special proceeding begun before the Clerk of any Superior Court shall be for any ground whatsoever sent to the Superior Court before the Judge, the Judge shall have jurisdiction; and it shall be his duty, upon request of either party, to proceed to hear and determine all matters in controversy, in such action unless it shall appear to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the Clerk, in which case he may do so." This law was enacted to cure the inconveniences caused by the decision and opinion in Brittain v. Mull, *supra*.

McMillan v. Reeves, 102 N. C., 550.

Baker v. Carter, 127 N. C., 92; Roseman v. Roseman, 127 N. C., at p. 497; Ewbank v. Turner, 134 N. C., 81; Springs v. Scott, 132 N. C., 551; Piercy v. Watson, 118 N. C., 976; Elliott v. Tyson, 117 N. C., 116 and cases there cited; In re Anderson, 132 N. C., foot of p. 247; Smith v. Gudger, 133 N. C., 627-628.

If the order of sale made by the Judge of Probate was not in strict accordance with the requirements of the statute, or, if the commissioner failed to perform his duties in full compliance with the order of sale, these derelictions of duty were but irregularities to be taken advantage of

at any time before final judgment, and within a reasonable time after final judgment. The final judgment, in the cause, could be attacked for fraud only by an independent action.

Lanier v. Heilig, 149 N. C., 387;
Hatcher v. Faison, 142 N. C., 367;
Scott v. Life Association, 137 N. C., foot of p. 520;
Vorhees v. Bank, 10 Pet., 449.

"It is elementary learning that a decree of a court having jurisdiction in a proceeding, in all respects regular on its face *as to parties*, can not be attacked collaterally."

Hargrove v. Wilson, 148 N. C., foot of p. 440.

Was not the decree, in the special proceeding in question, one "of a court having jurisdiction in a proceeding, in all respects regular on its face as to parties!"

We are now prepared to call the Court's attention to the plaintiff's attack upon the special proceeding, in question, more particularly.

In the first place, we have pointed out already that that proceeding was instituted in the Probate Court of Jackson county, pursuant to the express direction of the Supreme Court, and, in the second place, we have cited and quoted the statute authorizing such proceeding.

The petition was filed by the guardian of the lunatic, Thomas, about the 17th of May, 1880. Upon the filing of the petition the Judge of Probate made a finding of facts, upon which he based an order appointing James W. Terrell a commissioner to make sales of the lands of said lunatic and directing said commissioner to sell said lands at private sale, etc., Record, foot of p. 67 to top of p. 71.

Under this order, Terrell made sale of the trees in question, in 1883, to the amount of $1,129.60, and, in 1884, to the amount of $1,051.00, Record, foot of page 72.

The said commissioner reports that he collected the amounts for which these trees were sold.

The commissioner made many sales of real estate which he reported to the Judge of Probate, or rather to the Clerk, who had, as has been shown, succeeded to his

office and jurisdiction, all of which sales the said Clerk confirmed April 1st, 1885. Record, top of page 79.

The said commissioner executed deeds of conveyance to the purchasers of the trees in 1883 and 1884, which were introduced by the plaintiff in evidence as clouds upon his title, and are set out in full in the record as (1) plaintiff's Exhibit "E," Record, p. 97, plaintiff's Exhibit "F," p. 99 and plaintiff's Exhibit "G," p. 101. All these deeds were duly registered in the registry of deeds for the counties in which the lands upon which the trees in question were standing and growing were situated, prior to the date of the confirmation of the sales by the Clerk, to-wit, April 1st, 1885. The plaintiff, although he made many objections to the probates and registration of these deeds, upon the hearing, before the trial Judge, withdrew them all, Record, foot of page 115, 14th line from top. The confirmation of the sales by the Clerk, after the execution of these deeds by the commissioner rendered them valid and as effctual as if they had been executed after confirmation.

Clark v. Machine Co., 150 N. C., 374;
Koontz v. Northern Bank, 16 Wall., 196;
Adams v. Howard, 110 N. C., 15;
Herbert v. Waggoner, 118 N. C., 656;
Foushee v. Durham, 84 N. C., 58, foot of page;
In re Dickerson, 111 N. C., 114, middle of page;
Evans v. Spurgeon, 6 Grattan, 107, (Va.), same case, 52 Amer. Dec. 105;
Cole's Administrator v. Shaw, 3 W. Va., 299, 10 S. E., 637;
Files v. Brown, 59 C. C. A., p. 407, 124 Fed., 137.

There is no allegation that there was any fraud on the part of the commissioner, or of Loomis & Wheeler. It is said in Sledge v. Elliott, 116 N. C., 716, foot of page: "It is of the utmost importance that purchases in good faith and for value should be upheld, and that the confidence of the public in the stability of judicial decrees should be maintained." Syme vs. Trice, 96 N. C., 243. Purchasers at judicial sales are bound only to see that the

Court had jurisdiction and that it ordered the sale. Fowler v. Poor, 93 N. C., 466."

Thompson vs. Tolmie 2d Pet. 157 (U. S.)

Again, it is well settled that a court will not vacate the order of sale where the purchaser has paid the purchase money and the owner has received the benefit thereof.

Dawkins vs. Dawkins, 93 N. C., 291, foot of page;
Rich vs. Morisey, 149 N. C., 49, foot of page;
Dawkins vs. Dawkins, 104 N. C., 301.

No order to make title is necessary when purchase money has been paid.

Brown vs. Coble, 76 N. C., 393.

Terrell's deeds and the confirmation related to the day of sale as if all were one act.

Vass v. Arrington, 89 N. C., 14-15.

It was held in Sinclair vs. Williams, 43 N. C., (8th Ird. Eq.) 235, that, "Where land has been sold under a decree of a court of equity, the purchaser will be protected against the legal claim of one who, or whose guardian, was a party to the decree." In this proceeding, at the time the clerk entered his order confirming the sales, there being no infants in the case, it was unnecessary that a judge should approve the clerk's order of confirmation. Mauney v. Pemberton, 75 N. C., 219; Spencer v. Credle, 102 N. C., 76; Stafford v. Harris, 72 N. C., 198.

It is true that the proceeding begun in 1880 was ex-parte, but there were no infants in the case. We insist, therefore, that when the Clerk confirmed the sale of the trees in question, the purchasers were entitled to be thenceforth at least to be deemed the legal owners of the trees for all purposes of protecting the same, Code of N. C., 1883, Sec. 942, but more especially in this case should the purchasers be deemed the legal owners, inasmuch as at the time of said confirmation the commissioner had executed and delivered to them the deeds of conveyance.

It is not necessary that the defendant should rely upon any portion of the record of the special proceeding, in question, other than those portions thereof which we have discussed, except as evidence showing conclusively that

the lunatic, up to the time of his death in 1893, and his heirs after his death, are conclusively bound by said record.

By reference to the record in this case, pp. 79-80, it will be seen that James R. Thomas, a son of the lunatic, in the lifetime of his father, applied to the Clerk of the Superior Court of Jackson county, for letters of guardianship of the person and estate of the lunatic, and that letters of guardianship were granted to him by the said Clerk on the 25th day of October, 1899 (Record, 95), and, on the same day, this newly appointed guardian filed his petition before said Clerk praying for a license to sell his ward's lands at private sale, and such license was granted to him upon his said petition. Record, 81-82.

It further appears, Record, 83-86, that after the death of the said ward, the said James R. Thomas became his administrator, and that he, individually and as such administrator, together with all the other heirs of his said deceased ward, came into the special proceeding of 1880, by petition, wherein they alleged, "That on the 14th day of May, 1880, W. L. Hilliard, guardian of W. H. Thomas, Sr., then a lunatic, filed a petition before the Clerk (then Judge of Probate), of the Superior Court of Jackson county, and, upon said petition of said guardian, it was ordered and adjudged that Jas. W. Terrell be appointed a commissioner, and as such commissioner should be authorized and empowered to sell and convey, upon the terms therein set forth, all of the lands belonging to the said William H. Thomas, Sr., lunatic, and upon confirmation of such sales to make title to the purchasers."

These heirs further alleged in their petition, that Terrell, as they were informed and believed, acting under authority conferred upon him by said judgment, proceeded to sell, from time to time, etc., and continued to make sales until the 25th of October, 1889, when petitioner, James R. Thomas, was duly appointed and qualified as guardian of said W. H. Thomas, Sr., in the place of W. L. Hilliard, who had resigned, and that said James R. Thomas, upon petition and order of the Court was substituted for Terrell as commissioner as aforesaid, and clothed with the power and authority theretofore exercised by the said

Terrell, to sell at public or private sale, any of the land belonging to his said ward, W. H. Thomas, Sr.

These petitioners further alleged that the petition of James R. Thomas, guardian of W. H. Thomas, Sr., and the order predicated thereon empowering your petitioner, James R. Thomas, as guardian and commissioner, to sell the lands of his said ward was by inadvertence entitled, "In the matter of the estate of W. H. Thomas, lunatic," whereas it was intended to be a part of said original proceeding entitled, "In the matter of W. H. Thomas, lunatic," and that by inadvertence the Clerk of the Superior Court of Jackson county had kept in separate files the petitions of W. L. Hilliard, guardian, and James R. Thomas, guardian, as well as the orders made in pursuance of each of the petitions by the Court.

These petitioners, after making many other allegations in their petition, not material to be set out here, wound up with the prayer, "That the two proceedings entitled respectively as aforesaid, "In the matter of the estate of W. H. Thomas, lunatic," and, "In the matter of W. H. Thomas, lunatic," be consolidated, and that this petition be treated as a supplemental petition in said proceedings so consolidated, and that the petitioners be made parties plaintiff.

This petition was verified by the said James R. Thomas the 31st day of December, 1898. Record, foot of page 83 to 86. On the 6th day of July, 1899, the Clerk of the Court made an order granting the prayer of the aforesaid petition (Record, foot of page 86 to foot of page 87), and his order was approved and in all things confirmed by a Judge of the Superior Court, Record, near foot of page 87. And thereafter, to-wit, September 8th, 1899, counsel for the petitioners and for James W. Terrell entered into a written stipulation in regard to pleadings, in which stipulation, as a part thereof, was the following: "It is further agreed that this special proceeding, entitled as above, shall be entered upon the docket of the Superior Court of Jackson county, at the Fall Term, 1899, thereof, to be then further proceeded with according to law, and for all purposes.

"It is further agreed that any motion which counsel

for any of the parties or for said James W. Terrell may desire to make in this cause, shall be heard at chambers at Murphy, Cherokee county, on Oct. 24th, 1899, before the judge then holding court in said county of Cherokee, and that such motions shall then and there be heard by said judge as of the Fall Term, 1899, of the Superior Court of Jackson county. And that the clerk of this court shall make his order transferring this cause to the Superior Court at the term time accordingly." Record, page 88.

The Clerk of the Court, upon the filing of this stipulation, and, basing his action thereupon, made his order in accordance therewith, Record, pp. 88-89, and at the time fixed for hearing the motions at Murphy, the Superior Court Judge took jurisdiction of the case and made an order therein appointing a referee to report upon all issues of fact and law raised by the pleadings in the cause, and especially to take and state an account of the sales of land of W. H. Thomas, Sr., made by the said James W. Terrell by virtue of the authority vested in him constituting him commissioner, and of the receipts and disbursements of the purchase money received from the purchasers of any such lands," etc. Record, foot of pages 105-107. By consent, Thomas A. Jones, Esq., was associated with said Bell as referee and these referees filed their report on the 26th February, 1905. Record, pages 89 to 95.

The said referees, in regard to the trees in controversy in this suit, in their 9th finding of fact, (Record, 111), reported as follows: "9. We find that the said James W. Terrell as commissioner, in 1883 and 1884, sold and conveyed to J. T. Loomis and Xenaphon Wheeler, poplar and white pine trees situated upon the lands of the estate in Graham and Swain counties to the amount of twenty-one hundred and eighty-one and fifty one-hundredths ($2,181.50), dollars, which were reported to and confirmed by the Court; we find that this price was reasonable and a fair value for the same at the time of sale."

No exceptions were filed to the report of the referees by any of the parties to the cause, and at October Term, 1905, the Court passed upon the report, as follows:

"This cause coming on to be heard before his Honor, Walter H. Neal, Judge holding the October Term of Jackson Superior Court, 1905, and being heard upon the report of M. W. Bell and Thos. A. Jones, referees;

"And no exceptions having been filed to the report of the said referees;

"It is accordingly, upon motion of Henry G. Robertson, of counsel for James W. Terrell, ordered and decreed that said report be and the same is hereby confirmed in all particulars.

"It is further considered and adjudged that James W. Terrell have and recover of the estate of Wm. H. Thomas, lunatic, and of James R. Thomas and others, the respondents in said action, the sum of four hundred and twenty-eight 63-100 dollars with interest on the same from the 28th day of February, 1905, until paid.

"It is further considered and adjudged that the said James W. Terrell have and recover from the estate of the said William H. Thomas, lunatic, and the respondents in this action, the cost incurred in this proceeding, to be taxed by the Clerk."

Looking back over the record we have recited, and considering it in the light of the statutes and decisions of the Supreme Court we have cited, and from some of which we have largely quoted, it would be difficult, nay, impossible to find any defect of jurisdiction of subject matter or of persons. The jurisdiction of the Judge of Probate and of the Clerk who succeeded him was complete, and the enlarged jurisdiction of the Superior Court before the Judge in term was none the less perfect and adequate.

There is no contention, on the part of the respondent, that the Court was without jurisdiction to sell the lands for the support of the lunatic and that of his family. This was clearly the primary object of the application to sell. If it be conceded that the sale of the lands was not sought for this purpose alone, but also for the payment of the lunatic's debts, this did not deprive the Court of its admitted jurisdiction. The Probate Court and the Clerk, who succeeded him, and the Superior Court before the Judge, in term, the successor of both, clearly had jur-

isdiction of the parties and the land. Jones v. Coffey, 97 N. C., 349. Now a judgment may be good in part and void as to other parts.

Moore v. Ingram, 91 N. C., 376, 379.

The judgment would be void only for the excess, or so far as it exceeded the jurisdiction of the Court. Ex parte Lange, 18 Wall., 178; Day v. Micon, 18 Wall., 640.

Judgment may be good as far as authorized by law and had for the residue. Summers v. United States, 91 U. S., 27.

Judgment good for as much as the Court had jurisdiction to include in it. 28 Cyc., 697-698 note 4. Hamilton v. Brown, 161 U. S., 274; Savage v. Hussey, 48 N. C., 149; Strake v. Cotton, 115 N. C., foot of p. 83.

Jurisdiction cannot be ousted because further relief is asked than which it is not in the power of the Court to grant.

Deloatch v. Coman, 90 N. C., 188, citing
Ashe v. Gray, 88 N. C., 190, 193.

See also Morris v. O'Briant, 94 N. C., 72; Finch v. Baskerville, 85 N. C., foot of p. 307, is directly in point.

How can this Court be expected to hold that the North Carolina Court had no jurisdiction and that its sale of the trees in question was void, with no more facts before it than are furnished by the record sent to it?

We insist that this record shows beyond a doubt that the action of the North Carolina Court was, if not entirely regular when it began, became so, to all intents and purposes, before it was ended, and long before the petitioner had any claim to the trees in question or to the land out of which they grew.

United States v. Eisenbeis, 50 C. C. A., 179, 184, 185, 112 Fed., 190, 195, 196, and cases there cited.

At the time the trees were sold, and deeds for the same duly executed and confirmed, and duly registered in the counties where the land on which the trees were standing, was situated, enough of the lands had not been sold, under the order of the Probate Court, for the support of the lunatic and his family.

Now, having shown that the Judge of Probate acquired jurisdiction of the person of the petitioner, W. L. Hilliard, guardian of William H. Thomas, Sr., lunatic, and of the subject-matter of the petition filed by him in the office of the said Judge of Probate on the 17th day of May, 1880 (record, top of page 78), to-wit, the lands and contemplated sale thereof for the support of the said lunatic and his minor children; and having also shown that the successor of the said Judge of Probate, the Clerk of the Court, succeeded to all the jurisdiction of said Probate Court, and that the commissioner appointed by the Judge of Probate to sell said lands, for the purposes aforesaid, acting under his power and authority, did sell the trees, in question, to the parties from whom the defendant claims, for full and fair value, and received from the said purchasers the full amount of the purchase money, which was duly applied to the purposes for which said trees were sold, and executed deeds of conveyance to said purchasers, conveying to them the said trees; that said deeds of conveyance were duly admitted to probate and duly registered in the proper counties long prior to any claim of the plaintiff in this suit; and that said sales and conveyances were duly confirmed by the Clerk on the 1st day of April, 1885 (Record, top of page 79); and that all the facts, in relation to said petition of said guardian, and orders of sale and execution of deeds by the commissioner, the payment of the purchase money and confirmation of sales by the Clerk, have been conclusively established by the proceedings which were had in said special proceeding after said sales and execution of said deeds and confirmation thereof by the Clerk, it only remains for us to maintain the validity of the said deeds of conveyance and their effectual vesting, in the defendant, absolute and indefeasible titles to and estates in said trees, without condition or limitation in respect of the time of cutting and removing the same.

FIFTH POINT.

THIRD ASSIGNMENT OF ERROR.

(Petition, 15.)

In the first place, it will not be questioned, that the

trees standing and growing upon the lands were a part of the lands, and real estate.

In Moring vs. Ward, 50 N. C. (5 Jones L.), at page 275, it is held that, "Not only the land, *but any part thereof, the herbage, trees, minerals,* i. e., *coal, copper, etc.,* could be made the subject of a term for years;" and before this, in the case of Mizell vs. Burnett, 49 N. C., 249, the Court said: "It was properly conceded that a contract to sell 'growing trees,' is within the statute of frauds, being a contract to sell 'land or some interest in, or concerning the same.'"

And this doctrine has been adhered to without qualification down to the present time. The last case directly upon this point is Midyette vs. Grubbs, 145 N. C., 85, top of page 88. The Supreme Court, after calling attention to the rulings of the courts of other countries and states, said: "The views announced in these decisions have not prevailed with us. On the contrary, this Court has uniformly held that standing or growing timber is realty, and that deeds and contracts concerning it are governed by the laws applicable to that kind of property. Brittain vs. McKay, 23 N. C., 265; Whitted vs. Smith, 47 N. C., 39; Ward vs. Gay, 137 N. C., 597. In some of our former decisions, there was an intimation given that, in contracts of this nature, where the growing timber was absolutely conveyed and the time of removal was limited to a definite number of years, the effect of such a contract was to create a lease; but in *Bunch's case,* 134 N. C., 116, decided intimation was given that such a construction of the contract was not the correct one; and in *Hawkins' case,* 139 N. C., 160, the Court decided that such an instrument was not a lease, but 'conveyed a present estate of absolute ownership in the timber.' *Hawkins' case, supra,* p. 162. This case has been approved in several recent decisions of the Court." * * * See also Warren v. Short, 119 N. C., foot of p. 41.

"As said by Walker, J., in *Ives' case,* "It may now be taken as settled that growing trees are part of the realty, and the contract to sell and convey them, or any interest in or concerning them, must be reduced to writing."

The Supreme Court of Massachusetts, as far back as

1808, in the case of Clap v. Draper, 4 Mass., 266, 3 Amer. Dec. 215, decided, that an estate of inheritance in trees and timber might be conveyed, and that the grantee might maintain *trespass quare clausum fregit.* The court said: "Upon looking into the cases, we are satisfied that the plaintiff, having an inheritance in the trees, and an exclusive right in the soil of the close, as far as was necessary for their support and nourishment, may maintain trepass for breaking the close, as well as for cutting. It appears to be a principal of law well settled, that when a man has an interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in the enjoyment of the particular use of the soil, he may maintain *trespass quare clausum fregit;* but not if his interest is in common with others."

We will now call the attention of the court to the language of the deeds from Terrell to Loomis and Wheeler, Record 116-122. The language of the conveying part of these deeds is as follows: "Have bargained and sold and do by these presents grant, bargain, sell, transfer and convey unto the said J. F. Loomis and Xenophon Wheeler sixteen hundred and fifty-five poplar and twelve hundred and ninety-five pine trees, two feet and over in diameter at the butt," (and describes the land upon which the trees are growing, and then proceeds), "which poplar and pine trees are marked with the letter 'L,' and the said J. F. Loomis and Xenophon Wheeler and their heirs and assigns shall have the right to enter upon the lands upon which the trees are situated and upon any other lands belonging to us for the purpose of cutting and removing said trees, and shall have the right of ingress and egress over the same and the right to make such roads over any of said lands suitable and proper to enable them to remove said trees, *whenever they may so desire.* And we farther agree with said party of the second part that we will not do anything, or cause anything to be done, to injure or kill said trees. We covenant with the said J. F. Loomis and Xenophon Wheeler, their heirs and assigns, that we are lawfully seized of said trees and have good right to sell and convey the same, that they are unincumbered, and further that we will forever warrant and de-

fend the title to the same against the lawful claims of all persons whomsoever."

The commissioner, Terrell, set forth in the deeds that he was acting, as commissioner to sell, under the order of Judge of Probate of Jackson County, N. C. He was but the finger of the Court.

Ward v. Dortch, 69 N. C., 279, citing Stone v. Latham, 68 N. C., 422.

The Statute under which the probate court acted in appointing the commissioner, which has been quoted in full in this brief already, expressly empowered the judge of probate to make an order for the sale of real estate, "*or any part thereof,* in such manner and upon such terms as he may deem advisable."

According to the authorities we have cited, there can be no doubt that the growing trees were a part of the land which the commissioner was authorized to sell, and, while the order appointing him and directing him to sell, did not specifically empower him to sell the trees apart from the soil, yet there can be no dispute that the judge of probate possessed jurisdiction to so direct, and as the order was very general, and left the commissioner to exercise a wide discretion, and he sold the trees for full and fair value, and received the purchase money, and his sale was confirmed, equity, if not the law, will give to his sales the same effect as if the order of sale had been specific as to the trees.

It is manifest that the purpose of the conveyance of the trees was to vest an absolute title, and it was left with the purchasers to decide when, if ever, they would remove the same—the deeds declaring that they might remove the trees *whenever they so desired* and containing a covenant that nothing should be done to injure or kill the trees, and a fee simple covenant of warranty of title.

Certainly under such deeds, the defendant could not be required to cut and remove the trees until after demand and notice from the owners of the soil. No such demand or notice was ever served. There is no stipulation of time for removal inserted in the deeds and the courts have no authority to insert one. In Devlin on

Deeds, 383c., cited, with approval, in Hawkins v. Lumber Company, 139 N. C. 164, it is said, "The whole object is to construe the deed so as to give effect to it if possible as a conveyance." In Cobb v. Hines 44 N. C. (Bus. L.), page 347, the Supreme Court in regard to the construction of deeds said: "1st. That the construction be favorable and as near the minds and intents of the parties as the rules of law will permit; 2nd. That the construction be upon the entire deed, not merely upon disjointed parts of it, and therefore that every part of it be, if possible, made to take effect, and no word but which may operate in some shape or other." Apply these principals to the deeds in question, in what "shape or other" could the words, "and shall have the right of ingress and egress over the same and the right to make roads over any of said lands suitable and proper to enable them to remove said trees whenever they may so lesire," operate if the purchasers were required to cut and remove the trees within what might be held to be a reasonable time, and what would have been the necessity to incorporate into the deed a covenant not to kill the trees and the fee simple covenant of warranty of the title?

In Woody v. Timber Co., 141 N. C., 471, decided May 22, 1906, the court said: "This is an absolute conveyance of so many trees, marked and branded, and contains no clause limiting the time in which they may be removed. It is *possible* the courts may so construe the meaning of the deed as to require the grantee, or those claiming under him, to remove the trees within a reasonable time."

But the court did not intimate that it would hold that the grantee would forfeit his title to the trees if he had neglected to remove them within a reasonable time from the date of his deed although no notice or request by the owner of the land to remove them had been made. What the court meant by what it said was, that if the owner applied to the grantee to remove and he refused, the court might possibly so construe the deed as to justify it in making an order for their removal a disobedience of which would constitute a contempt. This could only be done by a court of equity, and it is laid down in Story on

Eq. Juris., (Sec. 1319), that "it is a universal rule in equity, never to enforce a penalty or forfeiture."

Besides the deed concerning which the court used the language quoted, which is copied in full in the Report, does not contain a provision which gives the grantees a discretion to remove, *"whenever they may so desire."* Here is an express contract that the purchasers shall have the right to choose their own time.

In other states it has been expressly ruled, that a purchaser is not required to remove within a reasonable time when the conveyance is absolute and contains no clause limiting the time within which the trees may be removed.

Butterfield Lumber Co. v. Guy, 46 Southern Rept., 68; Magnetic Ore Co. v. Marbury Lumber Co., 104 Ala., 465, 16 Southern Reporter, 652, 27 L. R. 343, 53 Amr. St. R 73; North Georgia Co. v. Beebee, (Ga.), 57 S. E., 873, and cases there cited; Lodwick Lumber Co. v. Taylor, 99 S. W.——, 99, Tex.

Having shown that the defendant is the absolute owner of the trees, and not under any obligation to cut and remove the same within a reasonable time, the next question is, how are the trees to be identified? The description contained in the deeds is, "Which poplar and pine trees are marked with the letter 'L'," and, at the date of said deed, they were "two feet and over in diameter at the butt." It is admitted by the plaintiff that the trees, if there are any, are growing upon the lands described in his complaint.

It is held in this State, in Higdon vs. Rice, 119 N. C., foot of page 624, "That every deed is so far ambiguous as to require extrinsic evidence to fit the description to the thing," and in Carpenter v. Medford, 99 N. C., 495, where the description was, "nine walnut trees on my premises on the waters of Pigeon river, Haywood county, (Township No. 4)," it was held that parol evidence was competent to identify the trees, inasmuch as, at the time of the contract, the trees had been "selected, measured and marked, but were not identified in the contract."

The objection of plaintiff that the lands were not sufficiently described in the petition filed by Hilliard, guardian, August 17th, 1880 (Record, foot of p. 73), has nothing

to support it. The description of the land was set forth in exhibit "A," appended to the petition, Record, top of p. 64, which exhibit is not in the record, as it appears in the record in this case, but the presumption is it was sufficient. Besides the description in the deeds made by the commissioner Terrell to Loomis and Wheeler was full and recognized by the Clerk of the Court when he confirmed the sales.

Brown v. Coble, 76 N. C., 394;
Williams v. Harrington, 33 N. C., foot of p. 622.

It needs no citation of authorities or decisions of courts to show that the plaintiff and those from whom he claims, and all the world were charged, by law, with notice of all those deeds contained, from the date of their registration, or, at the very least, from the date of the confirmaion of the sales, to-wit, April 1st, 1885, which was after the registration of the deeds.

The plaintiff has made no claim that he was an innocent purchaser for value, without notice of these deeds. He never offered any evidence that he did not have actual as well as constructive notice. The burden is upon the plaintiff to show that he purchased without notice.

Bostic v. Morgan, 132 N. C., 743;
Cox v. Wall, 132 N. C., 730.

SIXTH POINT.

The fourth assignment of error is without merit. The sales of the trees had been made and confirmed many years before petitioner or his vendor became interested in the lands on which the trees are located. Record, foot of p. 72 and top of p. 79. Respondent purchased from Bailey who purchased from the lunatic's heirs in 1903. Record, 31-47.

The statement in the fourth assignment of error (Petition, near middle of p. 15), that "the alleged sale of the trees claimed in this cause" was "not brought into question," (if by "question" is meant notice), until the filing of the report by referees in 1905 "after the title claimed by complainant had passed from the heirs of W. H.

Thomas," is not sustained by the record, but is wholly disproved by it.

The report of the sale of the trees was made and confirmed in 1885, as just stated. In 1889 Terrell, who sold and executed deeds for the trees, resigned, and Jas. R. Thomas, a son of the lunatic, was appointed in his place. Record, foot of p. 83. If by "not brought into question," is meant that the validity of the sale of the trees and deeds conveying them, and the confirmation of said sale and deeds, by the court, were never challenged, it is another matter,—there was never any "question made of their validity until the petitioner began his action in the State Court in June, 1908, more than 20 years after sale, and deeds were made and confirmed and the deeds duly registered. What was Terrell's successor, James R. Thomas, doing all the years between 1889 and 1903, when Bailey purchased the lands? The lunatic died in 1893.

The special proceeding, under which the trees in question were sold and conveyed, was begun before the probate Judge of Jackson county on the 17th day of May, 1881 (Record, 63), and was not ended until October, 1905. Record, 96. It got into the Superior Court before the Judge on the 8th day of September, 1899. Record, 88-89. On the 31st of December, 1898, the heirs of the lunatic, W. H. Thomas, deceased, intervened and filed a petition in the proceeding. Record, 83-84. Before this time the Court had acquired jurisdiction of all the land of the lunatic as the record shows.

Now in the same Court, in 1903, James R. Thomas as guardian for certain infant grandchildren of the lunatic, files a petition for authority to make a private sale to Bailey of the interest of his infant ward in the lands on which the trees in question are standing. Of course, being the proposed purchaser of that interest, Bailey became a party to that proceeding. Record, 31-46. This latter proceeding was but a part of the one begun on the 17th day of May, 1881, into which Jas. R. Thomas as guardian for the said infant grandchildren had brought them as parties petitioners. Record, 83. The final decree in the petition of 1903 was made by the Judge of the Superior

Court. Record, middle of p. 44 and foot of p. 46. The respondent is a purchaser from Bailey.

As we have already shown, the special proceeding of 1881, having got into the Superior Court in term time before the Judge the Court then had jurisdiction for all purposes—jurisdiction of the parties and the land, and this jurisdiction was exercised through the petition of Jas. R. Thomas, guardian of 1903 to be permitted to sell at private sale the interest of his said infant wards. McLean v. Breese, 113 N. C., middle of p. 393; Ewbank v. Turner, 134 N. C., 80, and cases hereinbefore cited on this point.

The doctrine of *lis pendens* has no application to the case here. The proceedings in Jackson county were not in an action involving title to real property. Rev. N. C., Sec. 460. The proceedings were notice to all the world. But this point is absolutely immaterial because the deeds conveying the trees had been registered many years before the death of the owner of the land.

The heirs of the owner, in their petition, in the special proceeding in question, alleged that the commissioner was empowered to sell and convey all of the lands belonging to W. H. Thomas, Sr., a lunatic, and upon confirmation of such sales to make title to the purchasers. Record, middle of p. 83. What more could be asked than a description that covered all the lands?

Janney v. Robbins, 141, foot of p. 402.

The truth is, plaintiff knew all about the Terrell deeds when he made his purchase and this has never been denied. He went into the matter with his eyes open.

We may say here that nothing is more common now than to buy the timber growing on lands in timbered sections without buying the soil, and such has been the case for half a century in this country.

The Court, in the case at bar, has appointed a Special Master, upon respondent's own motion, to take evidence to identify the trees, and this is likely to protract the litigation for a long time. Record, 120.

If the Court should be of opinion that the doctrine of reasonable time applied to the conveyances under which

defendant claims ownership of the trees, the defendant could easily establish a state of facts to show that, at no time since the conveyances were executed has it been practicable to remove the trees without incurring an expense greater than their full value. There is a prospect for the construction of a railroad, at an early day, over a route that will come very near the lands on which the trees are standing and this prospect enhances their value greatly.

The respondent in this petition is, of course, indifferent as to who owns the soil of the lands upon which its trees are growing.

The opinion of the Circuit Court of Appeals will be found in full in Record, beginning on 137.

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REXFORD *v.* BRUNSWICK-BALKE-COLLENDER COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 188. Argued March 14, 1913.—Decided April 14, 1913.

The disqualification under § 3 of the Court of Appeals Act of 1891 arises not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein upon which it is the duty of the Circuit Court of Appeals to pass.

Under § 3 of the Court of Appeals Act of 1891, a judge is not disqualified from sitting in a cause because he had previously passed upon a motion which did not involve a non-waivable question of jurisdiction if the parties voluntarily and unequivocally eliminate all the questions involved in the motion from consideration by the Circuit Court of Appeals.

The time for filing a petition for removal is not essential to the jurisdiction of the Federal court, and may be the subject of waiver or estoppel.

Judges of Federal courts should avoid asking counsel if objections to the jurisdiction of the court are withdrawn, as the withdrawal of such objections to be effectual must be purely voluntary.

A decree of the Circuit Court adjudging right of possession to one of the parties but appointing a special master to take evidence as to identity of the articles, is not final but interlocutory only and therefore is not appealable.

The act of 1891 does not permit an appeal to the Circuit Court of Appeals from a judgment that does not finally dispose of the whole case.

181 Fed. Rep. 462, reversed.

THE facts, which involve the construction of the Circuit Court of Appeals Act as to disqualification of judges to sit on the trial of cases and as to what judgments are reviewable by the Circuit Court of Appeals, are stated in the opinion.

Mr. Julius C. Martin, with whom *Mr. J. H. Tucker* was on the brief, for petitioner.

Mr. James H. Merrimon, with whom *Mr. T. D. Bryson* and *Mr. S. W. Black* were on the brief, for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was a suit by the owner of a large body of lands in two counties in North Carolina to cancel certain deeds under which the defendant was claiming several thousand

growing trees on the lands, to enjoin the defendant from entering on the premises and cutting or interfering with any of the trees thereon, and to recover damages for trees alleged to have been wrongfully cut and removed before the suit. The bill charged, in effect, that the deeds were utterly void; that if they were not originally void, all rights under them had been exhausted by the felling and removal of all the trees covered by them; and that, if those rights had not been thus exhausted, they had been lost by abandonment and lapse of time. The answer asserted the validity of the deeds, alleged that such cutting and removal as occurred prior to the suit was done in the lawful exercise of the rights acquired under the deeds, denied that those rights had been lost by abandonment, lapse of time or otherwise, and asserted that most of the trees covered by the deeds were still standing and the defendant was entitled to cut and remove them without any restriction in point of time. It appeared from the pleadings that the deeds had been executed twenty-four years before the suit and did not purport to cover all the trees, but only a designated number of pine and poplar trees two feet in diameter at the butt, all marked with the letter "L." After the issues were framed the Circuit Court, with the acquiescence of the parties, entered the following order:

"And it appearing to the court that the rights of the defendants in this action depend primarily on several questions of law based on documentary evidence of its title to the trees in question;

"And it further appearing to the court that it would facilitate the hearing of said cause, if such documentary evidence were offered and such preliminary question of title first disposed of by the court;

"Now, therefore, it is ordered that these questions of law and the documentary evidence bearing thereon be first presented to the court for argument and all questions

of fact in this cause be held in abeyance until said preliminary questions are disposed of by the court."

A partial hearing pursuant to that order resulted in the rendition of a decree to the effect that through the deeds in question the defendant acquired an absolute and indefeasible title in fee simple to the trees therein described, as also a right of ingress and egress for the purpose of cutting and removing them, and that under a proper construction of the deeds the defendant was not restricted to a reasonable time within which to fell and remove the trees, but was entitled to do so whenever it chose. The decree concluded: "And this cause is retained for further orders." Shortly thereafter an order was entered reciting that "there is much other proof touching the matters in issue necessary to be heard, looking to a final judgment," and appointing a special master "to take proofs of all and singular the issues herein (except the evidence in the cause heretofore heard by this court), especially to take evidence concerning the identity of certain marked trees described in the pleadings, and to report the number and identity of such trees, and to ascertain and report his findings to this court."

Without awaiting the incoming of the report of the special master or the action of the court thereon the plaintiff prayed and was allowed an appeal from the decree before described to the Circuit Court of Appeals, and the decree was there affirmed. 181 Fed. Rep. 462. The plaintiff then petitioned this court for a writ of certiorari, which was allowed.

The first question that claims our attention is, whether one of the judges who sat at the hearing in the Circuit Court of Appeals was disqualified under the statutory provision, act of March 3, 1891, 26 Stat. 826, c. 517, § 3, which declares "that no justice or judge before whom a cause or question may have been tried or heard in a District Court, or existing Circuit Court, shall sit on the trial or hearing of such cause or question in the Circuit

Court of Appeals." The facts bearing on this question are these: The suit was begun in a state court, and was removed to the Circuit Court by the defendant on the ground of diverse citizenship. The amount in controversy and the citizenship of the parties were concededly such as to admit of the removal, but the plaintiff, conceiving that the right of removal was not seasonably asserted, moved on that ground alone that the suit be remanded to the state court. The motion was denied, and the plaintiff excepted. When the cause came on for hearing in the Circuit Court of Appeals the district judge who had heard and denied the motion to remand (but had done nothing else in the case) was sitting as one of the judges of that court in virtue of an assignment under the Court of Appeals Act. Counsel for the plaintiff thereupon suggested the question whether the district judge was disqualified to sit on the hearing of the appeal, and the court inquired whether the objection to the removal would be insisted upon. Counsel for the plaintiff answered that "it would not" and that he "believed the case had been properly removed." The hearing then proceeded, the district judge sitting as one of the judges and participating in the decision, which made no mention of the objection to the removal, doubtless because it was regarded as expressly withdrawn. In the petition for certiorari and in the supporting brief the plaintiff, although admitting the above colloquy, insisted that the district judge was nevertheless disqualified.

Unless what was said by counsel for the plaintiff in that colloquy completely relieved the Circuit Court of Appeals from considering and deciding the question relating to the removal, there can be no doubt of the disqualification of the district judge. The terms of the statute, before quoted, are both direct and comprehensive. Its manifest purpose is to require that the Circuit Court of Appeals be composed in every hearing of judges none of whom will be

in the attitude of passing upon the propriety, scope or effect of any ruling of his own made in the progress of the cause in the court of first instance, and to this end the disqualification is made to arise, not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the Circuit Court of Appeals to consider and pass upon. *American Construction Co.* v. *Jacksonville &c. Co.*, 148 U. S. 372, 387; *Moran* v. *Dillingham*, 174 U. S. 153. That the question may be easy of solution or that the parties may consent to the judge's participation in its decision can make no difference, for the sole criterion under the statute is, does the case in the Circuit Court of Appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below?

Whether such a question was involved in this instance turns upon the effect to be given to the declaration of counsel for the plaintiff, made before the hearing was begun in the Circuit Court of Appeals, that the objection to the removal would not be insisted upon, because he believed the case was properly removed. If that operated to eliminate the question relating to the removal and to relieve the court from considering or deciding it, it seems plain that the statute did not apply. On the other hand, if counsel's declaration amounted only to a consent that the court as then composed might proceed to a hearing and decision of that question, it seems equally plain that the statute did apply and that the consent given was of no effect whatever. We think the former is the correct view. Whether the removal was taken within the time designated in the removal act was a question which the plaintiff could raise and insist upon or waive at his option. It was not jurisdictional in the sense that the Circuit Court or the Circuit Court of Appeals was required to notice it *sua sponte*. As was said by this court in *Powers* v. *Chesapeake*

& Ohio Railway Co., 169 U. S. 92, 98: "The existence of diverse citizenship, or other equivalent condition of jurisdiction, is fundamental; the want of it will be taken notice of by the court of its own motion, and cannot be waived by either party. *Manchester &c. Railway* v. *Swan*, 111 U. S. 379. But the time of filing a petition for removal is not essential to the jurisdiction; the provision on that subject is, in the words of Mr. Justice Bradley, 'but modal and formal,' and a failure to comply with it may be the subject of waiver or estoppel." (Citing cases.)

Of course, to be of any effect the withdrawal of the question which the judge has tried or heard in the lower court must be purely voluntary. The record shows that it was so in this instance, and counsel for the plaintiff has not suggested the contrary. But that our ruling may not be misapprehended, we deem it well to observe that the court should avoid such an inquiry as was made of counsel in this case, lest it be mistaken for an invitation to withdraw the question. Our ruling rests on the ground that there was no such mistake here.

With the question arising on the removal proceedings eliminated, as we think it was by counsel's declaration, there was left no ground for regarding the district judge as disqualified.

The plaintiff advances several arguments to show that the decision of the Circuit Court of Appeals should have been one of reversal, rather than of affirmance, but it will not be necessary to state or consider them. In the Federal courts an appeal, as a general rule, lies only from a final decree. It is otherwise in the exceptional instances specified in § 7 of the Court of Appeals Act as amended April 14, 1906, 34 Stat. 116, c. 1627, and in two or three similar enactments, but none of these includes the present case. What we have said of the decree of the Circuit Court shows that it was not final, but interlocutory only. It did not dispose of all the issues and was but a step to-

ward a final hearing and decree. Further proofs were yet to be taken, and not until that was done could the entire controversy presented by the pleadings be adjudicated. This was recognized by the retention of the case for further orders and by the subsequent reference to a special master to take the remaining proofs. Plainly such a decree is not appealable. If it were, the case could be taken to the appellate court in fragments by successive appeals. But this the law wisely prevents by postponing the right of appeal until there is a final decree disposing of the whole case. *Perkins* v. *Fourniquet*, 6 How. 206; *Grant* v. *Phœnix Ins. Co.*, 106 U. S. 429; *McGourkey* v. *Toledo & Ohio Ry. Co.*, 146 U. S. 536; *Covington* v. *Covington First National Bank*, 185 U. S. 270; *Ex parte National Enameling and Stamping Co.*, 201 U. S. 156.

As the Circuit Court of Appeals erred in entertaining the appeal, its decision is vacated and the case is remanded to the District Court, as successor to the Circuit Court, with directions to proceed to a final disposition of the case in regular course.

Reversed.